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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HOMEWOOD CITY BOARD OF EDUCATION; DR. GEORGE C. FRENCH, individually; JAMES L. HOLLOWAY, DR. MAMIE L. FOSTER, RICHARD T. OWENS, ROBERT BLACKSHEAR, and ELBERT R. BOONE, individually; MICHAEL S. GROSS, CLYDE J. COOK, JR., N. P. ARDILLO, CLAYTON C. NUNN, and MARGARET KACHELHOFER in their official capacities with the Homewood City Board of Education,

Petitioners,

v.

JEAN AVERY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit[1] erroneously made independent findings of fact and improperly disregarded the "clearly erroneous" standard of Rule 52 (a) Fed. R. Civ. P. in reversing the decision of the District Court as condemned in *Pullman-Standard v. Swint,* ..... U.S. ....., 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)?

2. Where the Fifth Circuit engaged in the precise practice condemned by this Court in *Swint* in an opinion issued one day[2] after this Court issued its opinion in *Swint,* should the decision of the Fifth Circuit be reversed for arrogating at the appellate level independent fact finding responsibilities?

3. Whether the Fifth Circuit erred in failing to remand the case to the District Court for factual determinations in accordance with the balancing test proposed in *Mt. Healthy City School Dist. v. Doyle,* 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) which opinion was not before the District Court at the time of the trial?

4. Whether petitioner Board of Education met its burden under *Mt. Healthy, supra,* to articulate a legitimate nondiscriminatory reason for its action where the Board terminated a teacher for violating a valid and reasonable school board policy concerning maternity leave?

5. Whether a board of education may terminate a teacher for violating a school policy where the teacher admitted knowing of the policy, and flagrantly violated that policy, if the teacher claims exemption from the policy because her child was conceived out of wedlock?

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[1]The United States Court of Appeals, Fifth Circuit (Unit B), which rendered the opinion below, is now the Eleventh Circuit.

[2]The decision of the Supreme Court in *Swint* was issued April 26, 1982, and condemned the historic practice of the Fifth Circuit of making independent findings of fact. The decision in this case by the Fifth Circuit was issued one day later on April 27, 1982, and continued the precise practice condemned in *Swint.*

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Petitioners,

v.

JEAN AVERY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Former Fifth Circuit (Eleventh Circuit) entered in this case on April 26, 1982. Petitioner timely filed and served a petition for rehearing and suggestion of rehearing en banc in said Court, and the same was denied without opinion by order entered December 1, 1982.

OPINIONS BELOW

The opinions and judgments of the courts below are reported as follows: (1) The judgment of the United States District Court for the Northern District of Alabama of April 15, 1980,

is reprinted as App. A-1; (2) The memorandum opinion of the U.S. District Court for the Northern District of Alabama Southern Division was unreported and is reprinted as App. A-2; (3) Opinion of the U.S. Court of Appeals for the Former Fifth Circuit on April 26, 1982, reported at 674 F. 2d 337 (1982) and is reprinted as App A-5; (4) the order denying the application for rehearing en banc on December 1, 1982, and is marked as App. A-13; (5) the order denying as moot petitioner's leave to file supplemental brief in support of petition for rehearing on December 1, 1982, is marked as App. A-16; (6) The judgment of the United States Court of Appeals for the Eleventh Circuit entered in this cause on April 26, 1982. (App. A-16)

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on April 26, 1982. A timely petition for rehearing en banc was denied on December 1, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTES AND REGULATIONS INVOLVED

The Fourteenth Amendment to the United States Constitution (Section 1) (App. A-17); Rule 52 (a) Fed. R. Civ. P. (App. A-17); 42 U.S.C. §1981 (App. A-17); Ala. Code §16-24-8 (1975) (App. A-18); Homewood Board of Education Maternity Leave Policy 1973 (App. A-18); Homewood City School Maternity Policy 1976 (App. A-18).

STATEMENT OF THE CASE

In *Pullman-Standard v. Swint,* ..... U.S. ....., 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982), this Court addressed exactly the question raised by the opinion of the Fifth Circuit Court of Appeals on this appeal. The decision of this Court in *Swint* was issued April 27, 1982; the opinion of the Fifth Circuit in

this case was issued April 26, 1982. Without the guidance of the *Swint* opinion,[3] the Fifth Circuit repeated the same erroneous practice in this case that the Fifth Circuit had made in *Swint:* The practice of finding facts *de novo* as part of the appellate review. In *Swint* this Court condemned exactly this historical and continuing practice of the Fifth Circuit in making independent findings of fact.

The District Court tried this case and found as a matter of fact that petitioner school board had discharged a tenured teacher for flagrantly violating the notification requirements of the school's maternity leave policy.[4] Respondent admitted she was aware of the maternity leave policy, and admitted she violated the policy by waiting until the very end of her pregnancy to advise the Board.[5] Against this factual backdrop where the District Court specifically found (1) the existence of a valid school policy, (2) an admitted violation of that policy, and (3) a discharge for that violation, the Fifth Circuit on appeal reversed and essentially rendered after making a *de novo* factual determination of the school board's intent in discharging the teacher.

Thus, this case raises the question whether the Fifth Circuit improperly traversed the appellate standards announced by this Court in *Swint* by disregarding the factual findings of the

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[3]It is also unfortunate that the District Court did not have the benefit of this Court's opinion in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). Respondent argued the relevance of *Mt. Healthy* for the first time on appeal; and, the action of the Fifth Circuit to reverse and, in essence, render, precluded any consideration of the *Mt. Healthy* standard by the District Court.

[4]No dispute existed among the parties as to the existence of the policy; its reasonableness or the fact that the respondent teacher violated the policy in a substantial manner. Respondent's attorney stipulated the validity of that policy.

[5]Respondent held a very sensitive and critical position with the Board. She was specifically hired for, and taught continuously in, a federally funded program to provide remedial reading to children in grades 1 through 5. Respondent teacher waited until November 23, 1976, to give the Board notice in writing that she was pregnant; respondent gave birth on December 24, 1976.

District Court, and substituting its judgment as to the factual issue of the Board's *intent* in discharging an employee.

The Homewood City Board of Education (hereinafter referred to as "Board" or "petitioner") operates as a relatively small suburban school system outside of Birmingham, Alabama. The Board consists of five members, one of whom is black. The Board operates pursuant to and in compliance with an area wide desegregation plan approved in *Stout v. Jefferson County Board of Education,* 466 F. 2d 1213 (5th Cir. 1972), *cert. denied,* 411 U.S. 930, 93 S. Ct. 1891, 36 L. Ed. 389 (1973); the District Court continues to monitor the employment practices of all schools including Homewood within the pending jurisdiction of that case.

Homewood has no history or record of any racial or employment discrimination: No charges or allegations in its entire operation and has had a black member serving on its Board for years.[6]

The Board maintained a written maternity leave policy requiring notice to the Board by the teacher four months prior to the expected date of delivery. (App. A-18) Plaintiff/respondent Avery, who held a sensitive and critical teaching position, knew of this policy, but waited until one month before delivery to advise the Board; Avery informed her principal on November 19, 1976 of her pregnancy; and the Board by letter November 23, 1976, just before Thanksgiving. Respondent gave birth on December 24, 1976. After a full due process hearing, Avery was discharged for showing flagrant disregard for the school policy; this decision was in turn affirmed by the Alabama State Tenure Commission (App. A-23), and the United States District Court (App. A-2).

Respondent Avery was employed by the Board from 1972 until her discharge on February 8, 1977. At the time of her

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[6]Mamie Foster, the black member, also serves on the Alabama State Tenure Commission whose function it is to protect the tenured rights of teachers. Ms. Foster recused herself on the appeal of this case to the State Tenure Commission.

discharge she had acquired tenured status under Alabama law. Throughout Avery's term of employment, the Board had in effect a maternity leave policy requiring notification. The Board's superintendent explained that the reason for this policy was to enable the Board to have sufficient time to find competent substitute teachers and to allow for a smooth and continuous transition in the education program.

In March of 1976, Avery became pregnant; her obstetrician confirmed her pregnancy in August of 1976. Although respondent admitted that she was aware of the maternity leave policy of the Board requiring notification, she did not notify the Board that she was pregnant until November 23, 1976, when she was eight months pregnant.

From the outset, Avery was advised by the principal of the school that she had violated the Board's notification policy and, when she met with the Superintendent, she was again advised that her delinquent notice constituted a serious violation of the school board's policy. Respondent admitted that she had not notified the Board of her pregnancy and stated that she had not intended to tell the Superintendent that she was pregnant.

On December 15, 1976, Avery was advised in writing that the Board would hold a hearing on January 6, 1977, to determine whether her contract of employment should be cancelled. The reasons provided in the letter of notification tracked the Alabama Tenure Law (App. A-21); namely, (1) insubordination, (2) neglect of duty in that she failed to comply with the notification policy, and (3) immorality. On February 8, 1977, the school board voted to cancel Avery's contract, and this decision was affirmed by the Alabama State Tenure Commission. Avery appealed this decision to the United States District Court alleging that she had been discharged not because of her admitted violation of the maternity leave policy, but because she had conceived her child out of wedlock.

The evidence before the Trial Court indicated that the Board of Education had strenuously and even-handedly applied its maternity leave policy requiring all teachers, black and

white, to give notice in advance of their expected date of departure. There is no evidence on record to show that the policy of notification was ever waived, or enforced in a discriminatory manner, and, counsel for Respondent stipulated that he was not attacking the notification policy.

The District Court found that Avery had been dismissed for three reasons: (1) insubordination, (2) neglect of duty, and (3) immorality.[7] The three grounds given respondent, and recited by the District Court, were the statutory grounds enumerated in the Alabama Tenure Act. (App. A-18) Following established practice, the District Court abstained from reaching constitutional questions, and declined to adjudicate the question of immorality, the constitutionality of the Alabama Tenure Law, and whether that law had a disparate impact on minorities.[8] The District Court made specific findings of fact concerning Avery's discharge; the Court found as follows:

> Defendants contend that the plaintiff's employment was also terminated on the grounds of insubordination or neglect of duty in not reporting her pregnancy. Clearly she did not comply with the school rules with respect to reporting. She knew about the rules and chose to ignore them.

(App. A-4) The judge then noted that pursuant to Alabama law, Ala. Code §16-24-8 (1975), "insubordination" is a valid ground for dismissal of a teacher, and includes "the willful refusal of a teacher to obey the reasonable rules and regulations of his or her employing board." The District Court concluded by finding that the notification policy of the Board was a valid and reasonable policy; the Court stated:

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[7]Under Alabama law, a tenured teacher may be terminated only for reasons enumerated by the statute. However, in the absence of a discharge for personal or political reasons, the Board under state law does not give reasons for a discharge after a hearing, but only its decision.

[8]Respondent Avery made no mention to the District Court of theories pertaining to "mixed-motive" cases; and asserted the relevancy of *Mt. Healthy City School Dist. v. Doyle, supra,* and related cases, for the first time on appeal to the Former Fifth Circuit.

> The notice rule or policy in the instant case is reasonable, and the school board was justified in terminating her for *this refusal.*

(App. A-5) (Emphasis added)

The Fifth Circuit, however, on appeal independently reviewed the factual basis for this specific decision of the District Court. The Fifth Circuit then determined that the District Court had not applied the correct standard of proof in assessing Avery's constitutional claims by not following the balancing test set down by this Court in *Mt. Healthy City School Dist. v. Doyle, supra.* Applying the *Mt. Healthy* standard as urged by respondent for the first time at the appellate stage, the Fifth Circuit found no evidence[9] that Avery would have been terminated absent her out of wedlock pregnancy. In making these findings the Fifth Circuit ignored the statutory strictures under Alabama Tenure Law, ignored the specific factual findings of the District Court that respondent had been discharged for violating a reasonable school policy, and ignored that the District Court had been given no opportunity to consider this case in light of *Mt. Healthy.* Nevertheless, the Fifth Circuit independently review the record, found no evidence that the *Mt. Healthy* test had been applied, and in the absence of such evidence arrogated to itself the responsibility to make factual determinations at the appellate level. The Fifth Circuit did not discuss the presence of a valid Board policy that had been violated; instead the Fifth Circuit looked only to see if the *Mt. Healthy* question had been asked: Namely, 'whether Avery would have been terminated absent her out of wedlock pregnancy.' What the Court found was an absence of that question rather than an absence of evidence in answer to that question. But with this in mind, the Fifth Circuit decided that *Andrews v. Drew Municipal Separate School District,* 507 F. 2d 611 (5th

[9]No evidence exists only if the Court ignores the following facts found by the District Court: (1) a valid Board policy had been violated by the respondent; (2) respondent was terminated for violating that policy. The District Court made affirmative findings on both of these critical points. The Fifth Circuit determined to ignore these findings.

Cir. 1975), *cert. dismissed as improvidently granted*, 425 U.S. 559, 96 S. Ct. 1752, 48 L. Ed. 2d 169 (1976) applied and controlled.

In *Andrews*, the school board maintained a policy creating an irrebuttable presumption that automatically disqualified from employment any parent of an illegitimate child.[10] On review of that policy, the Fifth Circuit in the *Andrews* case held that such an irrebuttable presumption regardless of the circumstances violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. Although Homewood did not have a similar policy to that in *Andrews*, the Fifth Circuit reviewed the evidence in light of *Andrews* and arrived at a different conclusion from that of the District Court. The Fifth Circuit concluded, based on its independent review, that the decision of *Andrews* applied because Avery had been dismissed, in the Fifth Circuit's opinion, for immorality, and not, as the District Judge had found, for violation of the school maternity leave policy. Substituting its review of the evidence for that of the District Court, the Fifth Circuit reversed and remanded with specific directions to enter judgment for respondent. Petitioner Board filed a petition for rehearing and suggestion for en banc hearing, which petitions were denied on December 1, 1982.

The jurisdiction of the United States District Court for the Northern District of Alabama, Southern Division was invoked pursuant to 28 U.S.C. §1343(3), (4); 42 U.S.C. §2000(e) — 5 (f), 28 U.S.C. §2201 and 2202, and 28 U.S.C. §1331.

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[10]Homewood had no such policy; in fact, they had never had a policy that automatically disqualified from employment any parent of an illegitimate child. Thus, *Andrews* would apply only in the absence of any other reason for terminating respondent for pregnancy out of wedlock. The Fifth Circuit ignored the other reason found as fact by the District Court; namely, the violation of a reasonable and valid policy.

ARGUMENT

REASON FOR GRANTING THE WRIT

I. The Court Below Erred by Disregarding the "Clearly Erroneous" Standard of Rule 52(a), Fed. R. Civ. P. and by Exceeding its Appellate Authority for Review Thereby Engaging in "Precisely the Historical Practice of the Former Fifth Circuit Condemned by the Supreme Court in *Pullman-Standard v. Swint*," ___ U.S. ___, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)

This case raises the question whether a school board may terminate an employee when that employee flagrantly violates a valid school policy.[11] The United States District Court answered that question affirmatively; the Fifth Circuit Court of Appeals reversed and essentially rendered ignoring the school policy involved and making independent findings of fact. Since this case raises important issues for the affected school board, both administratively and financially,[12] petitioner earnestly seeks full review by the Court.

Petitioner Homewood Board of Education maintained a maternity leave policy requiring notice four (4) months before the teacher's expected date of departure. Respondent Avery knowingly violated this policy by waiting until one month before the actual date of delivery to advise the Board. In the face of this admitted flagrant violation of known policy, the Board terminated Avery following a full due process hearing. In turn, this decision of the Board was affirmed by the Alabama Tenure Commission, and the United States District Court. The District Court specifically found as a matter of fact:

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[11]Respondent seeks by this cause of action an exemption from a valid school board policy. Respondent admitted having full knowledge of the maternity leave policy; and admitted violating that policy. Yet respondent asks the Court to ignore the importance of the rule and ignore her flagrant violation of this rule. Petitioner, on the other hand, maintains respectfully and sincerely that respondent should not be excused from a valid reasonable school policy just because respondent had a child out of wedlock.

[12]Respondent seeks full back pay for five years, plus interest, cost and attorney fees, an amount calculated to stagger this small school system.

(1) Avery knowingly violated the maternity leave policy,
(2) This violation constituted insubordination or neglect of duty,
(3) The Board dismissed Avery for violation of the maternity leave policy.

In reversing the decision of the District Court, the Fifth Circuit found *no evidence* that Avery would have been terminated absent her out of wedlock pregnancy. In reaching this conclusion the Fifth Circuit had to ignore totally and inexcusably the specific findings of fact made by the District Court:

> Avery was terminated for knowingly violating the maternity leave policy.

In short, the Fifth Circuit chose to ignore and disregard indisputable facts found by the District Court while substituting its own independent findings of fact to reach a novel and different conclusion. This practice of the Fifth Circuit is *exactly* what the same court had done in *Swint, supra,* and exactly what this Court condemned in that case: The arrogation of fact-finding responsibility by the appellate court.

In seeking a writ of certiorari, petitioner Homewood Board respectfully submits that the decision of the Fifth Circuit must be reversed in light of the carefully defined principles of law enunciated in *Swint, supra.*

Petitioner submits that the principles set forth in *Swint* are controlling for several reasons. First, in the *Swint* case, the Supreme Court emphatically condemned the practice of independent fact finding by the appellate courts in direct contravention of Rule 52(a) Fed. R. Civ. P., and resoundingly affirmed the principle of law that findings of fact should not be set aside unless clearly erroneous.

The second parallel between *Swint* and this case is that in each there were multi-factorial allegations[13] of discrimination,

[13]In *Swint, supra,* the employees alleged that the seniority system maintained by the employer/defendant violated Title VII of the Civil Rights Act of 1964. In Avery, the teacher acknowledged the maternity leave policy, but asserted the real reasons for her termination was not the violation of

and in each case the defendant/employers were given an opportunity at trial to explain and justify the reasons for their actions or policies. Moreover, in both *Swint* and the present case, the District Court heard all of the evidence, noted the demeanor of the parties and their witnesses, and assessed their credibility. Then, in both cases, after the District Court weighed the facts, the trial judge concluded that the plaintiff/employee had failed to prove discrimination. Yet in both *Swint* and the present case, the Fifth Circuit chose to disregard the findings of the District Court, and to arrogate an independent fact-finding responsibility by substituting its own findings of fact for those of the judge who tried the case and heard the evidence. To complete its job as both the appellate tribunal and fact finding tribunal, the Fifth Circuit in this case then reversed and remanded with instructions to enter judgment for respondent.[14]

In order to reverse the specific findings made by the District Court that Avery had been lawfully terminated, the Fifth Circuit had to ignore these factual findings of the District Court and the testimony of record. The trial judge explicitly found that Avery had willfully refused to comply with a regulation of the Board, and that she was discharged "for this refusal." The evidence showed that the maternity leave notice regulation was necessary for the efficient operation of the school since it afforded the Board an opportunity to find suitable replacement teachers – in this instance, a critical federally funded

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the policy – which was admitted – but because she had conceived her child out of wedlock. It is important to note that Homewood had no policy, written or otherwise, against conception out of wedlock as in *Andrews v. Drew Municipal Separate School District*, 507 F. 2d 611 (5th Cir. 1975), *cert. dismissed as improvidently granted*, 425 U.S. 559, 96 S. Ct. 1752, 48 L. Ed. 2d 169 (1976).

[14]This Supreme Court in virtually every discrimination case has reversed for further factual findings consistent with the legal standards that should be applied. *See Pullman-Standard v. Swint, supra; Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). By contrast, the Fifth Circuit maintains a more arrogant policy as shown in this case and *Swint*.

remedial teaching position. As a backdrop to the finding of the trial judge, the record showed that the Board's maternity leave notice policy had been applied equally to *all teachers* whether black or white:

> Q. (By Mr. Williams) : How long have you been superintendent, Dr. Gross?
>
> A. One year.
>
> Q. You are familiar with the rules and policies of the Board of Education of the City of Homewood, are you not?
>
> A. Yes, sir.
>
> Q. You are the chief executive officer of the Homewood Board of Education, are you not?
>
> A. Yes, sir.
>
> Q. And you apply those regulations and rules equally between white and black teachers?
>
> A. Yes, sir.

Dr. George French, the superintendent for the Homewood Board of Education for the years 1976 to 1978, and curriculum coordinator and assistant superintendent prior to that time, was asked the following questions:

> Q. Were you familiar with the rules and regulations and policies of the Homewood Board of Education as they applied to teachers and other personnel?
>
> A. Yes, sir.
>
> Q. I will ask you, during the time you served as assistant superintendent and the time you served as superintendent, you applied those rules and regulations to all personnel equally, both black and white?
>
> A. Yes, sir.
>
> Q. Both male and female?
>
> A. Yes, sir.

However, despite the evidence and the findings of the District Court, the Fifth Circuit reversed, assigning as its rationale a legal error; namely, that the District Court failed to apply the balancing test proposed in *Mt. Healthy City School Dist. v.*

Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).[15] Then applying what it believed to be the proper test, the Fifth Circuit concluded that the findings of the District Court were clearly erroneous.

This petition will address the question of the defendant's burden of proof as a separate issue; but a fair analysis of the record demonstrates that the Board discharged its burden in accordance with the *Mt. Healthy* test. *Mt. Healthy* requires that the employer Board prove that it would have discharged the employee for willful violation of the Board's policy even if there were no constitutionally protected rights. Of course, this is exactly what the District Court found – that Avery had been terminated for flagrant violation of the school's notification policy. The District Court clearly and carefully articulated this finding as follows:

> Defendants contend that the plaintiff's employment was also terminated on the grounds of insubordination or neglect of duty in not reporting her pregnancy. Clearly she did not comply with the school rules with respect to reporting. She knew about the rules and chose to ignore them. (App. A-4)

The Court then noted that pursuant to Alabama law "insubordination" is a valid ground for dismissal of a teacher, and includes "the *willful* refusal of a teacher to obey the reasonable rules and regulations of his or her employing board." The Court said specifically:

> Two Alabama cases hold that 'insubordination' in Section 16-24-8 of the Alabama Code includes the *willful* refusal of a teacher to obey the reasonable rules and regulations of his or her employing Board. (App. A-5)

The Court then made this critical and dispositive finding:

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[15]Avery made no mention of *Mt. Healthy* to the District Court. Nevertheless, the findings of the District Court were consistent with *Mt. Healthy*. Assuming Avery met her initial burden, defendant Board offered a valid non-pretextual reason for her termination: Violation of the maternity leave policy. This defense of the Board was accepted as a finding of fact by the District Court.

> The notice rule or policy in the instant case is reasonable and the School Board was justified in terminating her for this refusal. (App. A-5)

Grammatically, by the use of the singular modifier in "this refusal", the District Court found that the Board terminated Avery on *one legally sufficient ground;* namely, insubordination. The Court explicitly abstained from adjudicating the constitutional issue since the insubordination issue was dispositive.

Petitioner respectfully submits that the findings of the District Court conform in all respects with *Mt. Healthy*. The District Court found that even without considering the protected conduct, Avery had been justifiably discharged; or to use the terminology of *Mt. Healthy*, the Court implicitly concluded that even in the absence of the protected conduct, Avery would have been discharged for "this refusal."

In reviewing this case, the Supreme Court will note that the Fifth Circuit made the following erroneous assumptions in reversing the opinion of the District Court:

> (1) The Court assigned legal error regarding a factual question;
>
> (2) The Court did not remand the case to the District Court in light of this Court's pronouncement in *Mt. Healthy*, but reviewed the facts *de novo*;
>
> (3) The Court reversed and rendered, finding that Avery had been terminated on discriminatory grounds and that the finding of the District Court was "clearly erroneous" even though all parties admitted that there was a school policy and that the policy had been violated.

The action of the Fifth Circuit in this case represents a carbon copy of its action in *Swint;* in both cases, the Court attempts to rationalize its arrogance of fact-finding determination and its reversal of the District Court on factual matters, by assigning a legal standard. In *Swint*, the Fifth Circuit offered as its rationalization for making independent findings of fact, the ostensible application of a corrected legal standard for evidentiary review. In effect, the Fifth Circuit in both *Swint*

and in the instant case, dispensed with the "clearly erroneous" standard of Rule 52 in order to predicate its decision to reverse on an erroneous view of the law.

In *Swint*, the Supreme Court condemned this ongoing practice of the Fifth Circuit with these words:

> Furthermore, the paragraph in which the Court finally concludes that the USW seniority system is unprotected by §703(h) strongly suggests that the outcome was the product of the Court's independent consideration of the totality of the circumstances it found in the record.
>
> . . . .
>
> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings:
>
> > Fact finding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court. *DeMarco v. United States*, 415 U.S. 449, 450, 94 S. Ct. 1185, 39 L. Ed. 2d 501 (1974).
>
> Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue.
>
> . . . .
>
> Proceeding in this manner seems to us incredible unless the Court of Appeals construed its own well-established circuit rule with respect to its authority to arrive at independent findings on ultimate facts free of the strictures of Rule 52 also to permit it to examine the record and make its own independent findings with respect to those issues on which the district court's findings are set aside for an error of law. As we have previously said, however, the premise for this conclusion is infirm: whether an ultimate fact or not, discriminatory intent under §703(h) is a factual matter subject to the clearly erroneous standard of Rule 52. It follows that when a District Court's finding on such an ultimate fact is set aside for an error of law, the

> Court of Appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charge with the task of fact-finding in the first instance.

Id. at 102 S. Ct. 1792.

Clearly, the above-mentioned quotation from *Swint* applies equally to Avery. Avery's allegation of discrimination arose under Title VII of the Civil Rights Act. The District Court found as a fact that respondent Avery had violated the Board's rules, and that she was discharged because of that violation. If the District Court failed to apply the proper standard of the law, then the proper course of action should have been to remand the case back to the District Court with instructions to clarify the factual issues in light of the applicable standard of law. The propriety for remand is particularly appropriate where the District Court may not have considered relevant evidence as in *Swint* and in *Mt. Healthy*. To illustrate, in *Swint*, the Fifth Circuit admitted that the District Court "might have reached a different conclusion" had certain crucial evidence been considered. Id. at 102 S. Ct. 1791. If the application of the *Mt. Healthy* balancing test would have required additional evidence and cross-examination, procedural due process would require that the parties be given further opportunity to produce such evidence.

The Supreme Court has reaffirmed the principles of appellate review enunciated in *Swint* in several recent cases. For instance, in *White-Wilson Medical Clinic, Inc. v. Robbins*, ... U.S. ....., 102 S. Ct. 2229, 72 L. Ed. 2d 842 (1982), the Supreme Court issued this order:

> The judgment is vacated and the case remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of the *Pullman-Standard v. Swint*. . . .

In that case,[16] plaintiff Robbins, a black female, brought suit under Title VII of the Civil Rights Act of 1964 alleging that

[16] *Robbins v. White-Wilson Medical Clinic*, 660 F. 2d 1064 (5th Cir. 1981) provides another example where this Court reversed a judgment of the Fifth Circuit for making independent findings of fact.

the defendant medical clinic had discriminated against her because of her race. The District Court concluded that the defendant had established a legitimate, nondiscriminatory reason for failing to hire plaintiff, and that plaintiff had failed to prove by a preponderance of the evidence that the articulated reason was a pretext for discrimination. Accordingly, the District Court entered judgment for the defendant.

On appeal, however, the Former Fifth Circuit independently reviewed the evidence, as the same court has done in the instant case, and found that employees of the clinic had told Robbins that she had not been selected for employment because of her age and personality. The Eleventh Circuit then determined to its satisfaction that Robbins had the necessary clerical skills for the job, but that her employer had a tendency to equate pleasant personality characteristics (i.e. the ability to work well with others) with white people. The Eleventh Circuit found that the employer's rejection of Ms. Robbins was influenced by racially oriented criteria and, as such, the proffered explanation for not hiring plaintiff was pretextual. Accordingly, the appellate court reversed the judgment of the District Court and entered judgment for Robbins.

When the employing Board filed a petition for writ of certiorari to review this action by the Eleventh Circuit, this Court granted the writ, vacated the judgment, and remanded the case for further consideration in the light of *Swint*.

Petitioner respectfully submits that the action taken by the Supreme Court to vacate the judgment of the Eleventh Circuit in *Robbins* and to remand for further consideration in the light of *Swint* is exactly the proper action that should be ordered in this case. In the instant case, respondent Avery was found to have flagrantly violated a school policy. Avery learned that she was pregnant in August, but did not notify the Board until November (the eighth month of her pregnancy) that she would need a maternity leave. Where the facts are uncontroverted that a valid school rule[17] has been administered in an even-

[17]The validity of the maternity leave policy was not challenged. Respondent's counsel admitted that the policy was valid. However, to re-

handed manner, and that this valid policy has been violated, it is inconceivable that the Fifth Circuit could find discriminatory intent.

In resolving the allegations of discrimination, the Fifth Circuit necessarily focused its attention on the factual question of *intent*. The resolution of the issue whether the Board's intent was based on discriminatory or nondiscriminatory factors constitutes a question of fact as shown by the analysis of this Court in *Swint:*

> Treating issues of intent as factual matters for the trier of fact is commonplace. In *Dayton Board of Education v. Brinkman,* 443 U.S. 526, 534, 99 S. Ct. 2971, 2977, 61 L. Ed. 2d 720 (1979), the principal question was whether the defendants had intentionally maintained a racially segregated school system at a specified time in the past. We recognized that issue as essentially factual, subject to the clearly erroneous rule. In *Comm'r v. Duberstein,* 363 U.S. 278, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1960); the Court held that the principal criterion for identifying a gift under the applicable provision of the Internal Revenue Code was the intent or motive of the donor – 'one that inquires what the basic reason for his conduct was in fact.' 363 U.S. at 286, 80 S. Ct., at 1197. Resolution of that issue determined the ultimate issue of whether a gift had been made. Both issues were held to be questions of fact subject to the clearly erroneous rule. In *United States v. Yellow Cab,* 338 U.S. 341, 70 S. Ct. 177, 179, 94 L. Ed. 150 (1949), an antitrust case, the Court referred to 'findings as to the design, motive and intent with which men act' as peculiarly factual issues for the trier of fact and therefore subject to appellate review under Rule 52.

Id. at 102 S. Ct. 1790.

Similarly, in *Rogers v. Herman Lodge,* ..... U.S. ....., 102 S. Ct. 3272, 73, L. Ed. 2d 1012 (1982) the Supreme Court again held that the question of discriminatory intent was a question

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inforce the Board's position that the policy was not pretextual, the case of *deLaurier v. San Diego Unified School District,* 588 F. 2d 674, 679 (9th Cir. 1978) may be enlightening. In that case, the reasons for this policy were discussed with approval in depth.

of fact subject to the clearly erroneous standard; this Court stated:

> Our recent decision in *Pullman-Standard v. Swint*, ... U.S. ....., 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982) emphasizes the deference Fed. Rule Civ. Proc. 52 requires reviewing courts to give a trial court's findings of fact. 'Rule 52 broadly requires that findings of fact may not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings. . . . At 102 S. Ct., 1789. The Court held that the issue of whether the differential impact of a seniority system resulted from an intent to discriminate on racial grounds 'is a pure question of fact, subject to Rule 52's clearly erroneous standard.' Id. at 102 S. Ct., at 1789. The *Swint* court also noted that issues of intent are commonly treated as factual matters.

Id. at 102 S. Ct., at 1790.

Beyond all question, therefore, it should be clear that discriminatory "intent", *vel non*, to discharge an employee is clearly a question of fact subject to the dictates of Rule 52 (a) Fed. R. Civ. P. which provides in pertinent part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses.

The heavy reliance placed on the factual findings of the trial court rests on the assumption that the trial judge is in the best position to evaluate the credibility of witnesses in the context of the trial setting as this Court noted in *Inwood Laboratories v. Ives Laboratories*, ... U.S. ....., 102 S. Ct. 2182, 2188, ... L. Ed. 2d ..... (1982):

> In reviewing the factual findings of the District Court, the Court of Appeals was bound by the 'clearly erroneous' standard of Rule 52 (a), Federal Rules of Civil Procedure. *Pullman-Standard v. Swint*, ... U.S. ....., 102 S. Ct. 1781, 71 L. Ed. 2d ..... (1982). That Rule recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence. *Zenith Radio Corp. v. Hazeltine Research,*

> *Inc.* 395 U.S. 100, 123, 89 S. Ct. 1562, 1576, 23 L. Ed. 2d 129 (1969). Because of the deference due the trial judge, unless an appellate court is left with the 'definite and firm conviction that a mistake has been committed,' *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948), it must accept the trial court's findings.
>
> . . . .
>
> Each of those conclusions is contrary to the findings of the District Court. An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.' *United States v. Real Estate Boards*, 339 U.S. 485, 495, 70 S. Ct. 711, 717, 94 L. Ed. 1007 (1950).

Id. at 102 S. Ct. at 2189, 2190.

The dispositive issue in the instant case is that of the "motivation" or "intent" of the Board, which issue the District Court resolved on the evidence of record: The Board dismissed Avery for clearly violating a valid policy.

On the record of this case, it is utterly without foundation to conclude that "no evidence in the record supports the proposition that Avery would have been dismissed absent consideration of her out-of-wedlock pregnancy." (App. A-10)

On the contrary, the Board had a clear and reasonable policy that was violated in a clear and unreasonable manner. Avery held a specialized position where continuity in the teaching program was essential. She knew of the maternity leave policy, but waited until the last hour to advise that the Board would need to find an appropriately skilled person to fill her federally funded specialized slot. Avery flaunted the policy and caused exactly the problem which the maternity leave policy sought to prevent. The facts in this case are clear; the rule was clear; the violation was clear; and the Fifth Circuit clearly erred in reversing the findings of fact by the District Court.

II. By Reversing the Case on the Facts Without Remand, The Fifth Circuit Denied the Board the Opportunity to be Heard on the Factual Issue of Intent

The central issue in the present case is whether the Board justifiably terminated Avery on the grounds of insubordination as found by the District Court; or whether it acted for unconstitutional discriminatory reasons. Certainly, the intent of the Board is the pivotal point of that inquiry.

In *Swint, supra,* the Supreme Court reviewed the issue of intent in a variety of situations and found that intent is a factual matter, for the trier of fact. For instance, the Court cited *Comm'r v. Duberstein,* 363 U.S. 278, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1960), where this Court held that "the principal criterion for identifying a gift under the applicable provision of the Internal Revenue Code was the intent or motive of the donor — 'one that inquires what the basic reason for his conduct was in fact' 363 U.S., at 286, 80 S. Ct., at 1197."

In the same manner, this Court in *Dayton Board of Education v. Brinkman,* 443 U.S. 526, 534, 99 S. Ct. 2971, 2977, 61 L. Ed. 2d 720 (1979) stated the question whether the Board had intentionally maintained a racially segregated school system was 'essentially factual, subject to the clearly erroneous rule.'

In accordance with these prior holdings, the Supreme Court in *Swint* methodically fashioned the proper procedure as follows:

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings.
>
> > Fact finding is the basic responsibility of district courts rather than appellate courts, and . . . Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court. *DeMarco v. United States,* 415 U.S. 449, 450, 94 S. Ct. 1185, 39 L. Ed. 2d 501 (1974).

> Likewise, when findings are infirm because of an erroneous view of the law a remand is the proper course unless the record permits only one resolution of the factual issue.

Id. at 102 S. Ct. 1790-1791.

Applying the above test to Avery's dismissal it is clear that the conflicting factual contentions concerning the Board's "intent" allow for more than one resolution. Furthermore, in the context of the instant case, the factual issue of intent must be resolved on the evidence of testifying witnesses, not documentation; yet the Fifth Circuit had no opportunity to observe or judge the credibility of those witnesses in the format required by *Mt. Healthy*.

Respondent argued to the Fifth Circuit that the decision of the District Court should be reversed because the Court did not treat this case as a *mixed-motive case* in accordance with *Mt. Healthy*. In *Mt. Healthy*, the Supreme Court considered a mixed-motive problem, and held that the District Court did not apply the correct legal standard. However, the Supreme Court refused to speculate on the resolution of the factual issues. Instead, the Supreme Court deferred the factual issues for resolution to the District Court for further proceedings consistent with the announced legal standards. The Supreme Court in *Mt. Healthy* refused to make factual determinations for the District Court or assume what the ultimate outcome might be if the District Court had applied the proper test from the record at hand. As in *Swint*, the Supreme Court in *Mt. Healthy* would not arrogate or divert that responsibility from the District Court.

If the standard set forth in *Mt. Healthy* is the proper test, this case should be remanded for further proceedings in accordance with the balancing test required by that opinion. The *Mt. Healthy* decision was not before the District Court at the trial of this case, and respondent raised the *Mt. Healthy* decision and the required test thereunder for the first time on appeal to the Fifth Circuit. Neither the District Court nor the Board had been given the opportunity to implement the requirements of *Mt. Healthy* at the trial. In similar circumstances this Court

has stated the propriety of remand; in *Givhan v. Western Line Consol. School,* 439 U.S. 410, 99 S. Ct. 693, 697, 58 L. Ed. 2d 619 (1982) the Court stated:

> Since this case was tried before *Mt. Healthy* was decided, it is not surprising that respondents did not attempt to prove in the district court that the decision not to rehire petitioner would have been made even absent consideration of her 'demands.' Thus the case came to the Court of Appeals in very much the same posture as *Mt. Healthy* was presented in this court. And while the District Court found that petitioner's 'criticism' was the 'primary' reason for the school district's failure to rehire her, it did not find that she would have been rehired, *but for* her criticism. Respondents' *Mt. Healthy* claim called for a factual determination which could not, on this record, be resolved by the Court of Appeals.

The necessity for a remand is even more pronounced when the court of appeals finds that a necessary factual inquiry has been omitted. The Fifth Circuit in Avery stated that "the district court's application of the wrong framework of proof caused it to neglect an essential inquiry." This, type of situation is identical in principle to that which occurred in *Swint* where the Court of Appeals found that an essential factual inquiry had been omitted:

> Yet the Court of Appeals, after holding that the District Court had failed to consider relevant evidence and indicating that the District Court might have come to a different conclusion had it considered that evidence, failed to remand for further proceedings as to the intent of IAM and the significance, if any, of such a finding with respect to the intent of USW itself. Instead, the Court of Appeals made its own determination as to the motives of IAM, found that USW had acquiesced in the IAM conduct, and apparently concluded that the foregoing was sufficient to remove the system from the protection of §703 (h).
>
> Proceeding in this manner seems to us incredible unless the Court of Appeals construed its own well-established circuit rule with respect to its authority to arrive at independent findings on ultimate facts free of the strictures of Rule 52 also to permit it to examine the record and

> make its own independent findings with respect to those issues on which the district court's findings are set aside for an error of law. As we have previously said, however, the premise for this conclusion is infirm: whether an ultimate fact or not, discriminatory intent under §703 (h) is a factual matter subject to the clearly erroneous standard of Rule 52. It follows that when a District Court's finding on such an ultimate fact is set aside for an error of law, the Court of Appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of fact-finding in the first instance.

Id. at 102 S. Ct. 1792.

For the same reasons, in *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 97 S. Ct. 1891, 1897, 52 L. Ed. 2d 453 (1977), the court said that even if, for argument's sake, the defendant/company's failure to consider line-driver applications was discriminatory, the company *"was entitled to prove at trial* that the respondents had not been injured because they were not qualified and would not have been hired in any event." Id. at 97 S. Ct. 1897, n. 9.

Therefore, in order that justice be done, the petitioner humbly requests that certiorari be granted so that this case may be tried in conformance with the principles of law set forth in *Mt. Healthy.*

III. The Burden of Proof Assigned to an Employer-Defendant in a Discrimination Suit is the Burden to Articulate Some Legitimate Non-Discriminatory Reason for its Action

Where an employer-defendant articulates a valid nondiscriminatory reason for its action, the action should be affirmed.

The Fifth Circuit in its review and reversal of Avery, justified its action on the premise that the District Court failed to apply the balancing test of *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). Yet a review of the record discloses that the District Court in substance made exactly those findings required by *Mt. Healthy.*

In *Mt. Healthy,* an untenured teacher, contested the decision of the school board not to renew his teaching contract. As in Avery, multiple motives were alleged; these included a constitutionality protected communication by Doyle to a radio station concerning the adoption of the school's dress code, and certain other incidents such as arguing and making obscene gestures to students. The Supreme Court warned against applying a rule which "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." (Id. at 97 S. Ct. 575) Then the Supreme Court articulated the test to be applied as follows:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that his conduct was a 'substantial factor' — or, to put it in other words, that it was a 'motivating factor,' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

Id. at 97 S. Ct. 576.

The requirements of the Supreme Court were followed precisely by the District Court below. The trial judge determined that the school board based its decision to terminate Miss Avery for the constitutionally permissible reason that she had violated a legitimate Board policy. There is no evidence, nor any reason to suspect that the judge based his decision on any standard other than that of the usual standard of proof in a civil case: namely, by balancing the evidence and deciding from the preponderance of the evidence that Avery was terminated for insubordination.

This Court established the sequence for proof as well as the burden of proof for the parties in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 802-4, 93 S. Ct. 1817, 36 L. Ed.

2d 668 (1973). In *McDonnell Douglas* this Court established three steps for allocating the burden of proof:

> (1) The plaintiff must establish a *prima facie* case of discrimination;
>
> (2) The employer can rebut the *prima facie* case by articulating some legitimate non-discriminatory reason for its action;
>
> (3) The plaintiff has an opportunity to show that the employer's proffered reasons were pretextual.

The importance of this classification is that it shows that the burden of proof remains with the plaintiff at all times.

Eventually, however, a conflict developed between the circuits as to the *defendant's* burden after plaintiff established a *prima facie* case. In *Furnco Const. Corp. v. Waters,* 438 U.S. 567, 578, 98 S. Ct. 2943, 2950, 57 L. Ed. 2d 957 (1978) the court described the defendant's burden in the following terms:

> . . . the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race . . . . To dispel the adverse inference from a prima facie showing under *McDonnell Douglas,* the employer need only 'articulate some legitimate nondiscriminatory reason for the employee's rejection.'

Subsequently, in *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24, 99 S. Ct. 295, 58 L. Ed. 2d 216 (1978), the Supreme Court further elaborated on the burden of proof placed on the employer/defendant who need only "articulate some legitimate nondiscriminatory reason" for its action and need not prove the absence of a discriminatory motive.

Eventually, the Supreme Court carefully and precisely set forth the defendant's burden of proof in a disparate treatment case in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207 (1981) in which the Supreme Court sought to resolve the conflicting interpretations between the various[18] circuits as follows:

[18]The Supreme Court granted certiorari in order to resolve the conflict. The cases cited by the Supreme Court as conflicting were: *Lieberman v.*

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. See *Sweeney, supra* at 25, 99 S. Ct., at 296. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas, supra,* at 804 - 805, 93 S. Ct. at 1825-1826.

In rendering its decision in *Burdine* the Supreme Court stated that the Court of Appeals had erred by requiring of the defendant too heavy a burden — that of *persuading* the Court

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Gant, 630 F. 2d 60 (2d Cir. 1980); *Jackson v. United States Steel Corp.,* 624 F. 2d 436 (3rd Cir. 1980); *Ambush v. Montgomery County Gov't,* 620 F. 2d (4th Cir. 1980); *Loeb v. Textron, Inc.,* 600 F. 2d 1003 (1st Cir. 1979); *Vaughn v. Westinghouse Electric Corp.,* 620 F. 2d 655 (8th Cir. 1980), *cert. was granted,* 101 S. Ct. 1504 (1981).

that legitimate, nondiscriminatory reasons existed for the employer's actions, when all that was needed was the employer to explain "clearly" such actions.

Petitioner submits that the standard of proof mandated by *Burdine* is equally applicable to this case. In the first place, the rationale in *Burdine* was based on the common law and Rule 30 of the Fed. R. Evid. The basic principle of law encompassed in Rule 30, that the plantiff bears the burden of proof, was applied to Title VII cases. The plaintiff must present a *prima facie* case of discrimination. This establishes a presumption which forces the defendant to produce evidence sufficient to rebut that presumed fact. When the inference of discrimination is met by the defendant by an explanation, or by articulating a nondiscriminatory reason for its action, the plaintiff must carry the burden of proving discrimination.

After Avery had made a *prima facie* case that she was terminated on grounds of immorality, there was a presumption that the Board had acted unconstitutionally. The Board then had to produce some sufficient nondiscriminatory explanation for its conduct. The Board did so by showing without dispute that Avery had violated a clear and important policy of the Board. The plaintiff then had to carry her burden of proof that the explanation proffered by the Board of Education was a mere pretext for its action. This was not done. The District Court found that Avery was discharged for violating a valid nonpretextual policy.

In pressing this argument, petitioner respectfully submits that the 'mixed-motive' label is a red herring serving only to divert the Court's attention from its proper focus. Few employee decisions are made on the basis of one factor alone; rather, as a rule, many criteria concerning both the employer's needs and the employee's characteristics enter into such multi-faceted decisions. In the cases that have been considered by the Supreme Court, a variety of mixed-motive situations have been presented. But regardless of the circumstances, this Court warned in *Mt. Healthy* that a plaintiff should not be placed in a better position because of the legally protected conduct

than the employee would otherwise enjoy. For example, an employee cannot champion a controversial first amendment issue in order to invoke protection for subsequent violations of legitimate work conditions: Such as showing up on time. A constitutionally protected activity does not insulate an employee from all other work conditions. Thus, if the employer can show a justifiable reason for its action, and the employee cannot discredit that reason, the employer should prevail. Otherwise, the employee may, in fact, be able to exploit improperly the constitutionally protected activity in order to perpetuate an injustice with regard to unrelated constitutional rights.

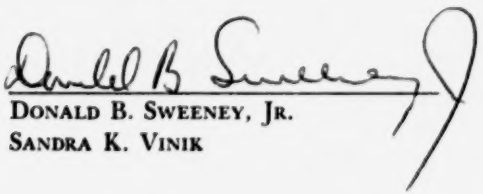
In the present case, the Board had a legitimate right to establish and enforce a reasonable maternity leave policy. If a *married* teacher, for example, violates the policy, the Board has the right to terminate the teacher under Alabama law. This is true not because the teacher is married, but because the teacher violated a reasonable condition of her employment. This is also true regardless of whether the teacher is unmarried. An unmarried teacher should not be able to profit from her unwed pregnancy in the sense that her condition creates an exemption from legitimate work conditions.

While the District Court in this case did not have the benefit of this Court's decision in *Mt. Healthy*, the District Court did find, as required by *Mt. Healthy, Burdine* and related cases, that petitioner's action in terminating Avery was based on a legitimate, nondiscriminatory reason. The Fifth Circuit clearly erred in totally ignoring respondent's violation of the maternity leave policy.

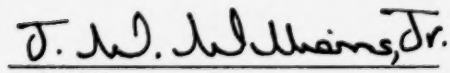
CONCLUSION

The historical and persistent practice of the Fifth Circuit to arrogate fact finding responsibilities was emphatically condemned by this Court in *Swint*. Since the *Swint* decision, this Court has consistently granted certiorari in order to reverse judgments of the Fifth Circuit in opinions where Court of Appeals continues to make *de novo* findings of fact. Since the Fifth Circuit continued this practice in the instant case, the Supreme Court should issue a writ of certiorari, reverse the judgment of the Fifth Circuit; and remand with directions for further consideration in light of *Swint*.

Respectfully submitted,



DONALD B. SWEENEY, JR.
SANDRA K. VINIK



J. W. WILLIAMS, JR.

Attorneys for Petitioner
Homewood City Board of Education

Of Counsel:

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Birmingham, Alabama 35209

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon all attorneys of record, namely: The Honorable Michael H. Gottesman, The Honorable James M. Harris, The Honorable Jeremiah A. Collins, 1000 Connecticut Avenue, N.W., Washington, D. C. 20036, The Honorable David Rubin, 1201 Sixteenth Street, N.W., Washington, D. C. 20036, The Honorable W. Troy Massey, P. O. Drawer 5058, Montgomery, Alabama 36101, via United States Mail, postage prepaid and correctly addressed, this the 25th day of February, 1983.

Donald B. Sweeney

DONALD B. SWEENEY, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JEAN AVERY	)	
	)	
Plaintiff	)	
	)	
v	)	C.A. 77-M-1360
	)	
HOMEWOOD CITY BOARD OF EDUCATION, et al.	)	
	)	
	)	
Defendants	)	

JUDGMENT

This matter came on to be heard before the court on August 29, 1979.

In conformity with the memorandum opinion entered contemporaneously, it is ORDERED, ADJUDGED and DECREED that the plaintiff Jean Avery have and recover nothing of the defendants and judgment is hereby entered for all defendants.

The costs of this action are taxed to the plaintiff.

Done this 1st day of April 1980.

/s/ FRANK H. MCFADDEN

Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JEAN AVERY	)	
	)	
Plaintiff	)	
	)	
v	)	C.A. 77-M-1360
	)	
HOMEWOOD CITY BOARD OF EDUCATION, et al.	)	
	)	
	)	
Defendants	)	

MEMORANDUM OPINION

This case arises out of the termination of plaintiff's services as a tenured school teacher with the Homewood City Board of Education. On December 16, 1976 plaintiff received a letter of proposed termination of services allegedly due to insubordination, neglect of duty and immorality. On February 11, 1976, following a hearing on the allegations, plaintiff was terminated by action of a majority of the Board of Education. On appeal to the Alabama State Tenure Commission the Board's action was affirmed by order dated April 1, 1977. This suit followed.

The matter having been tried, the court enters this Memorandum Opinion in lieu of findings of fact and conclusions of law, pursuant to Rule 52, Fed. R. Civ. P.

Plaintiff Jean Avery seeks reinstatement with full back pay from the date of her discharge, tenure status, lost benefits, declaratory and injunctive relief along with a reasonable attorney's fee to be taxed as part of the costs in this action. Plaintiff, a black unmarried female, bases her claim for relief on the following theories:

(1) That the Alabama Teacher Tenure Law under which she was discharged is unconstitutionally vague on its face or as applied to her in violation of the due process clause of the fourteenth amendment;

(2) That the Alabama Teacher Tenure law as applied in this case disproportionately burdens women and therefore violates Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, as amended;

(3) That the Alabama Teacher Tenure Law as applied in this case disproportionately burdens blacks and is neither justified by a substantial state interest nor by business necessity;

(4) That the Alabama Tenure Law, as applied in this case, violated plaintiff's constitutional right to privacy as embodied in the first, ninth and fourteenth amendments, and impairs her liberty interests encompassed by the fourteenth amendment;

(5) That the Alabama Tenure Law as applied in this case violates the equal protection clause and creates an arbitrary distinction which discriminates against children born outside of wedlock;

(6) That the Alabama Tenure Law as applied in this case violates the due process clause of the fourteenth amendment in that it treats unwed parenthood as conclusive evidence of immorality and thereby creates an erroneous irrebuttable presumption;

(7) That the decision to terminate plaintiff's employment was not supported by substantial evidence of unfitness to teach.

Defendants claim plaintiff was terminated for immorality, insubordination, and neglect of duty; defendants deny each of the allegations in plaintiff's complaint and deny that the Alabama Teacher Tenure Law is unconstitutional, either on its face or by application.

The plaintiff's employment was terminated by the defendant on the grounds of insubordination, neglect of duty, and immorality. The defendant School Board policy states that a teacher is to notify the superintendent at least four months before the expected delivery date of a child so that a replace-

ment can be found for the mother on maternity leave. The plaintiff knew of this policy. The plaintiff was told by her doctor in August 1976 that she was five months pregnant. Notice of her pregnancy was given to the School Board in November 1976. Plaintiff said she did not notify the superintendent before this because she was not sure she was pregnant since she had gained only approximately three pounds. On December 6, 1976, the plaintiff received a letter of proposed termination. The child was born out of wedlock on December 24, 1976. The plaintiff's employment was thereafter terminated.

The defendant admits in requests for admission and in testimony that it equates an unwed pregnancy with immorality. This court is of the opinion that this policy is sufficiently related to a legitimate objective, the morality of its teachers, to satisfy due process and equal protection. There are cases, however, which indicate that if the plaintiff's employment was terminated on the grounds of "immorality," this may violate due process, equal protection, and the plaintiff's right to privacy. In *Kilpatrick v. Wright*, 437 F. Supp. 397 (M.D. Ala. 1977), and in *Drake v. Covington County Board of Education*, 371 F. Supp. 974 (M.D. Ala. 1974), Judge Johnson stated, in dicta, that he has serious reservations as to the constitutionality of the immorality provisions of the statute (old Tit. 52, § 358, now § 16-24-8 of the Alabama Code). In *Drake* the court held for the plaintiff on the grounds that her right of privacy was invaded by the Board when the Board obtained information concerning her pregnancy from her doctor without the plaintiff's consent. In *Andrews v. Drew Municipal Separate School District*, 507 F. 2d 611 (5th Cir. 1975), the court held that a school district rule barring employment of unwed parents was insufficiently related to any legitimate objective to satisfy due process and equal protection. In *Andrews*, the Mississippi statute relating to immorality was similar to the Alabama statute attacked in this case. It is not necessary, however, to reach this issue.

Immorality was only one of the grounds for termination. Defendants contend that the plaintiff's employment was also

terminated on the grounds of insubordination or neglect of duty in not reporting her pregnancy. Clearly she did not comply with the school rules with respect to reporting. She knew about the rules and chose to ignore them. Two Alabama cases hold that "insubordination" in section 16-24-8 of the Alabama Code includes the *willful* refusal of a teacher to obey the reasonable rules and regulations of his or her employing Board. *State Tenure Comm'n v. Madison County Board of Education*, 282 Ala. 658, 213 So. 2d 823 (1968); *State ex rel. Steele v. Board of Education of Fairfield*, 252 Ala. 254, 40 So. 2d 689 (1949). The notice rule or policy in the instant case is reasonable, and the School Board was justified in terminating her for this refusal. This being the case, the court finds it unnecessary to reach the constitutional issue and the other issues raised by plaintiff.

/s/ FRANK H. MCFADDEN
Chief Judge

April 1, 1980

Jean AVERY, Plaintiff-Appellant,

v.

HOMEWOOD CITY BOARD OF EDUCATION, et al., Defendants-Appellees.

No. 80-7364.

United States Court of Appeals,
Fifth Circuit.*
Unit B
April 26, 1982.

Before MORGAN, TJOFLAT and ANDERSON, Circuit Judges.

TJOFLAT, Circuit Judge:

*Former Fifth Circuit Case, Section 9(1) of Public Law 96-452—October 14, 1980.

Jean Avery brought this action in the district court, alleging that the termination of her teaching contract by the Homewood City Board of Education was unlawful. Following a bench trial, the court concluded that although one of the grounds of Avery's discharge was arguably impermissible, the presence of another, permissible, ground rendered the termination lawful. Accordingly, the court entered judgment for the defendants. The district court erred by holding that the mere presence of a permissible ground for Avery's discharge rendered the discharge lawful. On the record before it, the court was required to enter judgment for Avery. We therefore vacate the judgment of the district court and direct the entry of judgment for the plaintiff.

I.

Jean Avery, a black woman, taught remedial reading at Shades Cahaba Elementary School in Homewood City, Alabama, from 1972 until her discharge on February 8, 1977. A written policy of the Homewood City Board of Education (the Board) required teachers who became pregnant so to inform the Superintendent of Education (the Superintendent) no later than the fourth month of pregnancy (the notice rule). In mid-November, 1976, Avery, who was not married, informed her principal that she was expecting to give birth in late December. The principal commented that Avery was in violation of the notice rule and instructed her to inform the Superintendent of her pregnancy, which Avery did.

Avery and the Superintendent, Dr. French, discussed Avery's situation in early December, 1976. According to Dr. French's testimony, he emphasized Avery's violation of the notice rule. According to Avery, Dr. French urged her to resign because of the "moral issue" of conception out of wedlock.[1]

In any event, Dr. French notified Avery by letter of December 15, 1976, that the Board would meet to determine whether to cancel her contract for three reasons: insubordination,

[1]No distinction was made at trial or on appeal among conception, pregnancy, and delivery out of wedlock. This case requires no such distinction, and we use the three terms interchangeably.

neglect of duty, and immorality. As Superintendent, Dr. French was authorized to recommend Avery's dismissal, and the three grounds stated in the December 15 letter were charges he would be bringing before the Board. As Dr. French testified, both "insubordination" and "neglect of duty" referred to Avery's violation of the notice rule, and "immorality" referred to her pregnancy out of wedlock.

On February 8, 1977, the Board voted to terminate Avery's employment immediately, and instructed Dr. French so to inform Avery. Dr. French did so by letter of February 11, 1977, specifying no reasons for the discharge. At trial, however, Dr. French, who recorded and transcribed the Board's deliberations as its secretary, testified that the reasons for the decision to dismiss Avery were the three grounds specified in the December 15 letter. The decision of the Board was affirmed by the Alabama State Tenure Committee.

Avery sued the Board, Dr. French, and the Board members (collectively appellees), alleging that her discharge violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1976); Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.* (1976; 42 U.S.C § 1981 (1976); and because it deprived her of rights guaranteed by the equal protection and due process clauses of the fourteenth amendment, 42 U.S.C. § 1983 (1976). She sought reinstatement with back pay, tenure status, lost benefits, declaratory and injunctive relief, and attorney's fees. Underlying each legal theory in the complaint was the premise that the Board unlawfully based its decision to dismiss Avery on her immoral conception of a child out of wedlock. Avery has at no time claimed that the notice rule is unlawful either facially or as applied.

The district court found that Avery's employment had been terminated in part for immorality and acknowledged that a discharge for that reason might be unconstitutional. However, the court found that it was not necessary to reach the issue:

> Immorality was only one of the grounds for termination. Defendants contend that the plaintiff's employment was also terminated on the grounds of insubordination or

neglect of duty in not reporting her pregnancy. Clearly she did not comply with the school rules with respect to reporting. . . . The notice rule . . . is reasonable, and the School Board was justified in terminating her for this refusal. That being the case, the court finds it unnecessary to reach the constitutional issue and the other issues raised by plaintiff.

II.

The district court held in effect that, without regard to the immorality charge, Avery's dismissal was lawful because it was based in part on a permissible ground. This holding contravened the standards of proof and causation mandated by the Supreme Court for mixed-motive discharge cases such as this one. In *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977), a teacher, who had previously been involved in an altercation with another teacher, an argument with school cafeteria employees, and incidents in which he swore at and made obscene gestures to students, communicated to a radio station the substance of a memorandum from his principal relating to teacher dress and appearance. The radio station announced the adoption of the dress code as a news item. Thereafter, the school board advised the teacher that he would not be rehired, citing his lack of tact in handling professional matters, with specific reference to the radio station and obscene gesture incidents. Claiming that the discharge violated his first and fourteenth amendment rights, the teacher sought reinstatement and damages in a suit against the school board. The district court concluded that the communication to the radio station was protected by the first amendment, and that because it had played a substantial part in the decision to discharge the teacher, he was entitled to reinstatement with back pay. The court of appeals affirmed. On certiorari, the Supreme Court vacated the judgment of the court of appeals and remanded the case.

The Court concluded that the fact that constitutionally protected conduct played a substantial part in the termination decision did not necessarily indicate a constitutional violation

justifying remedial action. 429 U.S. at 285, 97 S. Ct. at 575. Rather, the proper test would protect against the invasion of constitutional rights without commanding consequences not necessary to the assurance of those rights:

> Initially, . . . the burden was properly placed upon [the plaintiff] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. [Plaintiff] having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to [plaintiff's] reemployment even in the absence of the protected conduct.

Id. at 287, 97 S. Ct. at 576 (footnote omitted).

The framework of proof established in *Mt. Healthy* applies to Avery's constitutional claims.[2] The burden was initially on Avery to show that her conduct was constitutionally protected and was a substantial or a motivating factor in the Board's decision to discharge her. We assume, *arguendo*, that Avery's out of wedlock pregnancy was constitutionally protected. The district court found that the pregnancy was one of the reasons for Avery's discharge; the appellees did not dispute at trial that a motivating factor in Avery's discharge was immorality, and do not challenge the district court's finding to that effect on appeal.

[1] Having found that Avery had carried her initial burden, the district court should have gone on to determine whether the appellees had proven by a preponderance of the evidence that they would have discharged Avery even in the absence of her out of wedlock pregnancy. Since the court instead held that the other, unchallenged, ground for Avery's dismissal rendered

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[2]As noted at p. 341, *infra*, we depart from the usual sequence in this case by addressing the constitutional claims before the statutory claims. Therefore, we need not decide whether the *Mt. Healthy* analysis would apply to Avery's claims under 42 U.S.C. § 2000e, *et seq.*, 20 U.S.C. § 1681, and 42 U.S.C. § 1981.

the Board's decision lawful, the district court's judgment must be vacated.

III.

[2] Having concluded that the district court's application of the wrong framework of proof caused it to neglect an essential factual injuiry, our usual course would be to remand the case to the district court for that inquiry. Having thoroughly reviewed the record, however, we are convinced that the district court could not permissibly find that the appellees proved by a preponderance of the evidence that the Board would have discharged Avery even absent her out of wedlock pregnancy.

[3] The appellees insist that the record shows that Avery's violation of the notice rule was a substantial factor in the Board's decision to discharge her. This is correct, but irrelevant; the appellees' burden was to prove not that their decision was substantially motivated by that violation, but rather that Avery would have been dismissed even in the absence of her out of wedlock pregnancy. The record includes no evidence whatever to permit that inference. Dr. French charged Avery with immorality when he recommended her discharge and, according to Dr. French's testimony, the reasons for her discharge were the three grounds specified in his December 15 letter. Neither Dr. French nor the one Board member who testified offered any evidence, direct or circumstantial, to suggest what they would have done about Avery's violation of the notice rule if she had been married.[3] The appellees offered no evidence of the Board's treatment of married teachers who had violated the notice rule.[4] Since no evidence in the record supports the proposition that Avery would have been dismissed absent consideration of her out of wedlock pregnancy, we would

[3]Conversely, Dr. French did testify that he would have recommended her discharge for immorality even if she had given timely notice of her pregnancy.

[4]Avery offered documentary and testimonial evidence that the Board continued to employ married teachers who tardily notified the Superintendent of their pregnancies. That evidence, however, was somewhat equivocal, and we do not consider it in reaching our decision.

set aside as clearly erroneous a finding by the district court that the appellees proved that proposition by a preponderance of the evidence. Fed. R. Civ. P. 52 (a). Therefore, we find that the appellees did not carry their burden to show that they would have discharged Avery even absent her asserted immorality.[5]

IV.

[4] The only remaining question is whether a discharge on account of pregnancy out of wedlock is, as Avery maintains, unlawful. As we have noted, Avery challenges her dismissal on both statutory and constitutional grounds. Ordinarily, we would address the statutory claims first. However, the presence in this case of controlling authority that Avery's discharge on account of unwed pregnancy was unconstitutional counsels that we address Avery's constitutional claims first.

In *Andrews v. Drew Municipal Separate School Dist.*, 507 F. 2d 611 (5th Cir. 1975), *cert. dismissed as improvidently granted*, 425 U.S. 559, 96 S. Ct. 1752, 48 L. Ed. 2d 169 (1976), the defendant school district automatically disqualified from employment any parent of an illegitimate child. In a suit brought by an affected teacher aide and an affected applicant for a position as a teacher aide, we held that the prohibition against the employment of unwed parents violated the equal protection clause of the fourteenth amendment. Inquiring whether the classification established by the school district's policy was rationally related to a legitimate government interest, we rejected all three rationales offered in support of the contention that the rule furthered the creation of a properly moral scholastic environment: (1) that unwed parenthood is prima facie proof of immorality; (2) that unwed parents are unfit role models; (3) that employment of an unwed parent

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[5]Although we do not customarily make such factual findings, our authority to do so on a record permitting only one factual inference is clear. *See, e.g., Grosso v. United States*, 390 U.S. 62, 71-72, 88 S.Ct. 709, 715, 19 L.Ed.2d 906 (1968); *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 170, 87 S.Ct. 927, 932, 17 L.Ed.2d 834 (1967); *Felder v. United States*, 543 F.2d 657, 671 (9th Cir. 1976).

in a scholastic environment materially contributes to the problem of school-girl pregnancies. *Id.* at 614.

The appellees argue, as did the school district in *Andrews*, that unwed parenthood is *per se* proof of immorality and that a parent of an illegitimate child is an unfit role model. The appellees offer no support for either assertion that was not before us in *Andrews*, nor do the appellees offer any meaningful distinction between *Andrews* and this case.[6] Therefore, we hold that Avery's discharge was in violation of her rights under the equal protection clause of the fourteenth amendment. So holding, we need not reach her other claims.

The judgment of the district court is vacated. The case is remanded to the district court, which is instructed to determine the relief to which Avery is entitled and to enter judgment accordingly.

VACATED and REMANDED, with instructions.

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[6]One reason for our conclusion in *Andrews* that the first rationale offered by the school district was unconstitutional was that unwed parents were denied a due process hearing to which employees charged with other immoral conduct were entitled. *Id.* at 616. Avery was not denied a hearing. The equal protection component of the *Andrews* analysis is nonetheless applicable here. Furthermore, the discussion of due process in *Andrews* was dictum, since the holding of the case was that the school district's policy created an irrational classification and therefore violated the equal protection clause. *See id.* at 614, 617.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

NO. 80-7364

JEAN AVERY,
Plaintiff-Appellant,

versus

HOMEWOOD CITY BOARD OF
EDUCATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITIONS FOR REHEARING AND PETITIONS
FOR REHEARING EN BANC

(Opinion April 26, 1982, 5 Cir., 197...., ... F. 2d .....).
( )

Before MORGAN-TJOFLAT-ANDERSON

PER CURIAM:

( ) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petitions for Rehearing En Banc are DENIED.

(X) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal

*Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452—October 14, 1981).

Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petitions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ GERALD B. TJOFLAT

United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7364

JEAN AVERY,
Plaintiff-Appellant,

versus

HOMEWOOD CITY BOARD OF
EDUCATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Alabama

ORDER:

IT IS ORDERED that the motion of appellees for leave to file supplemental brief in support of petition for rehearing, and suggestion for *en banc* rehearing is denied as moot.

/s/ GERALD B. TJOFLAT
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

No. 80-7364

D.C. Docket No. 77M 1360-S

JEAN AVERY,
Plaintiff-Appellant,

versus

HOMEWOOD CITY BOARD OF
EDUCATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Alabama

Before MORGAN, TJOFLAT and ANDERSON,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby VACATED, and that this cause be, and the same is hereby REMANDED to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

April 26, 1982

ISSUED AS MANDATE: December 15, 1982

*Former Fifth Circuit case, Sec. 9(1) of Public Law 96-452—Oct. 14, 1980.

The Fourteenth Amendment to the United States Constitution (Section 1):

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 52(a) Federal Rules of Civil Procedure:

Rule 52. Findings by the Court.

(a) Effect

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

Section 42 U.S.C. § 1981:

§1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and

enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 16-24-8 of the Code of Alabama (1975):

§ 16-24-8. Cancellation of contracts — Grounds.

Cancellation of an employment contract with a teacher on continuing service status may be made for incompetency, insubordination, neglect of duty, immorality, justifiable decrease in the number of teaching positions or other good and just cause, but cancellation may not be made for political or personal reasons.

Homewood Board of Education Maternity Leave Policy — 1973.

MATERNITY LEAVE: Teachers desiring maternity leave should first discuss the matter with the Superintendent of Schools at least four months prior to the expected birth of the child. Such discussion to include desirable leave date, possible return date and any other matters of mutual concern. Following this discussion the teacher desiring maternity leave shall make her request in writing conforming to the agreements reached in conference. Pregnant teachers will be entitled to sick leave as long as they are on active duty, but will not be entitled to sick leave pay as terminal leave.

Teachers returning to work from a maternity leave will be given the same position as before when feasible and other things being equal. The deciding factor here will be based on what's for the best interest of the students.

HOMEWOOD CITY SCHOOLS

Maternity Leave Policy

The following shall be the policy of the Homewood City Board of Education concerning maternity leave: Disabilities

caused by pregnancy and childbirth will be recognized as are other temporary disabilities.

1. The length of time an employee may work will be determined by the employee and her physician. The employee may work as long as she desires, however the welfare of the students is paramount and impairment of her personal efficiency demands that she consider the student's welfare above her personal desires.

2. Within two months after learning of pregnancy the employee shall notify the Superintendent of this pregnancy.

3. No later than the fourth month, the employee should notify the Superintendent through the principal of their anticipated departure and return dates, at which time the administration will make the necessary adjustment for continuance of classes.

4. Sick leave may be taken upon physician's recommendation, i.e., when the teacher is unable to perform her job adequately. This refers to the period of time when the employee is under a doctor's care, hospitalized, or confined to bed because of pregnancy or childbirth.

5. Maternity leave, without pay, not to exceed one (1) year will be granted to the employee upon request. The employee shall request in writing to the board an extension beyond the one year.

6. The employee must file with the Superintendent a medical certificate from her physician attesting to her physical fitness to teach upon her return from maternity leave.

7. The teacher shall be eligible for re-employment at the beginning of the school semester following delivery. All rights of tenured employees will be observed in accordance with laws of the State of Alabama. Insofar as circumstances permit, we will assign an employee to a position similar to the one previously held, but not necessarily the same position.

8. Accumulated sick leave may, at the option of the teacher, be included in maternity leave disabilities.

Note: Equal Employment Opportunity Commission ruled, "for all 'job related' purposes, pregnancies are disabilities, and no plan which bars one sex from coverage conforms to Title VII of the Civil Right Act of 1964."

9-14-76

December 15, 1976

Miss Jean Avery
77 Long Street
Birmingham, Alabama 35217

Dear Miss Avery:

A hearing will be held on the 6th day of January, 1977 at 4:00 p.m. at the Homewood Board of Education to determine if your contract of employment will be cancelled.

This hearing will be held for the purpose of determining the cancellation of your contract of employment for the following reasons:

1. Insubordination.
2. Neglect of duty in that you failed to comply with the terms and provisions of the policy of the Homewood Board of Education in that you failed to notify the Superintendent of your pregnancy as outlined in the Statement of Policy.
3. Immorality.

You may appear at this hearing to answer the reasons for the proposed cancellation of your contract. If you elect to appear at this hearing, it will be necessary for you to file with the Homewood Board of Education at least five (5) days prior to the date this matter is set for hearing, notice of your intentions to contest.

This notice is given to you in conformity with Title 52, Section 359, Code of Alabama, recompiled 1958, as amended.

Yours very truly,

HOMEWOOD BOARD OF EDUCATION

By .....
Superintendent of Education

HOMEWOOD CITY BOARD OF EDUCATION

Special Session
February 8, 1977 7:00 p.m.

Present: James L. Holloway, Dr. Mamie L. Foster, Elbert R. Boone and Robert H. Blackshear

Absent: Richard T. Owens

The Homewood City Board of Education met in special session on February 8, 1977 at 7:00 p.m. to conduct a hearing in conformity with Title 52, Section 359 of the Alabama Law Code of 1940 and recompiled in 1952, to determine if the contract of employment of Miss Jean Avery should be cancelled based upon a letter of charges sent to her by certified mail on December 15, 1976. This hearing was extended upon the written request of Miss Avery from January 6, 1977 at 4:00 p.m. to February 8, 1977 at 7:00 p.m. After hearing all the testimonies of the witnesses and reviewing all exhibits introduced, a motion was made by Board member Robert Blackshear, and seconded by Board member Elbert Boone, that Miss Avery's contract be cancelled effective February 8, 1977. The role call vote was as follows: Robert Blackshear, Yes; Elbert Boone, Yes; Mamie Foster, abstained because of her position on the Alabama State Tenure Commission; James Holloway, Yes; Richard Owens, absent.

The Board instructed the Superintendent to notify Miss Avery by certified mail as to the cancellation of her contract.

ALABAMA STATE TENURE COMMISSION
Post Office Box 4177
Montgomery, Alabama 36104

April 1. 1977

IN THE MATTER OF JEAN AVERY v.
HOMEWOOD CITY BOARD OF EDUCATION
BEFORE THE ALABAMA STATE TENURE
COMMISSION

A meeting of the Alabama State Tenure Commission was held on April 1, 1977, in Room 480 of the State Office Building in Montgomery, Alabama. The appeal of Ms. Avery from the action of the Homewood City Board of Education in cancelling her employment contract was heard.

Upon consideration of the evidence presented and the arguments of counsel, the Commission finds that the Board's cancellation of Ms. Avery's contract was in compliance with the teacher tenure law. The action of the Homewood City Board of Education is, therefore, sustained.

Done this 1st day of April, 1977.

/s/ Dorothy Wright

Dorothy Wright, Chairman
Alabama State Tenure Commission

ANDREWS

v.

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT

No. 73-3177.

United States Court of Appeals, Fifth Circuit.

Feb. 3, 1975.

Appeals from the United States District Court for the Northern District of Mississippi.

Before BELL, SIMPSON and INGRAHAM, Circuit Judges.

SIMPSON, Circuit Judge:

This suit attacking the validity of the Drew Municipal School District's rule against employing parents of illegitimate children was initiated by two such parents, both mothers, against whom the rule militated. Named as defendants were the Drew Municipal School District (the District), George Ferris Pettey, its Superintendent, and the individual members of the District's Board of Trustees (the Board).

The complaint sought declaratory and injunctive relief to "redress the deprivation of rights and privileges and immunities of the plaintiffs guaranteed by the (sic) 42 U.S.C. 1981, 1983 et seq., Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d et seq.,[1] the Fifth and Fourteenth

[1]In paragraphs 11, 12 and 13 of the complaint, the plaintiffs detailed their claims of violations of their rights under the heading "VIOLATIONS OF LAW". The refusal by the defendants to employ plaintiff Andrews and the termination of the plaintiff Rogers was asserted to delegate the plaintiffs into an unconstitutionally created classification based upon their race, sex and unmarried parent status in violation of the constitutional and statutory provisions enumerated in the text, including Title VI of the Civil Rights Act of 1964, 42 U.S.C., Section 2000d. It was

Amendments to the United States Constitution. Plaintiffs further asked for declaratory relief under 28 U.S.C. Section 2201, 2202." Jurisdiction was invoked under Title 28 U.S.C. Section 1343.

Following a series of hearings the district court decided the case on the merits, holding that the rule violated both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. Andrews v. Drew Municipal Separate School District, N.D.Miss. 1973, 371 F.Supp. 27. We affirm for reasons stated below.

In the Spring of 1972, Superintendent Pettey learned that there were some teacher aides presently employed in the District who were parents of illegitimate children. Disturbed by this knowledge, Pettey immediately implemented an unwritten edict to the effect that parenthood of an illegitimate child would automatically disqualify an individual, whether incumbent or applicant, from employment with the school system.[2] There is no doubt that the policy is attributable solely to Pettey; there was no evidence that

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further alleged that Andrews was refused employment because of her race, sex and single parent status and that Rogers was discharged from her teachers' aide position because of her race, sex and single parent status, all in violation of the same constitutional and statutory provisions.

The district court's decision, Andrews v. Drew Municipal Separate School District, N.D.Miss.1973, 373 F.Supp. 27, contains no findings or conclusions with respect to violation of Title VI of the Civil Rights Act, Title 42, U.S.C., Sec. 2000d.

The complaint contained no assertion that Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunities provision, Title 42, U.S.C. § 2000e et seq., was violated. No assertion of any violation of Title VII was made during the district court proceedings, and the district judge made no findings or conclusions as to violations of Title VII.

[2]Pettey in testimony indicated confusion as to the expanse of the policy he had promulgated. He was positive that the rule should apply to all instructional personnel. Upon questioning, he expanded the list to include not only teachers and teacher aides, but also secretaries, librarians, dieticians, cafeteria operators, nurses, social workers, school principals, school volunteers and even PTA presidents. Although he was not positive, he did not think the rule should apply to bus drivers, janitors or maids.

he sought either the prior advice or the consent of the Board.[3]

Mrs. Fred McCorkle is one of the administrators responsible for implementing the unwed parent policy. As Coordinator of Elementary Instruction for the school district, she is in charge of the teacher aide program and recommends to Pettey who shall be hired to fill teacher aide vacancies. All potential teacher aides must submit an application to Mrs. McCorkle who then interviews them and investigates their applications. The investigation consists of consultations with other administrative staff members as well as the principals of the various schools concerning their knowledge of the applicant.

Both plaintiffs-appellees, Lestine Rogers and Katie Mae Andrews, were victims of the unwed parent policy. Lestine Rogers was hired as a teacher aide in the Fall preceding the initiation of the rule, although her application stated that she was single and had a child. After the Pettey policy rule was announced, Mrs. McCorkle informed Ms. Rogers that because she was the parent of an illegitimate child, she would not be re-hired for the following year. Katie Mae Andrews, on the other hand, knew about the Pettey rule prior to applying for a teacher aide position. Although she too was the mother of an illegitimate child, she did not so indicate on her application. Mrs. McCorkle learned of Ms. Andrews' illegitimate child in the course of her investigation of the application. She made a written notation of her finding on the application,[4] and refused to consider Ms. Andrews further.

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[3]The Board and its individual members were unaware of the rule until the commencement of this action. The evidence indicates, however, that the Board then ratified the policy and all actions taken under it.

[4]Across the top front of Ms. Andrews' application, Mrs. McCorkle wrote, "Single with a child 3 or 4." On the back of the application, Mrs. McCorkle wrote:

From the beginning, unwed mothers only, not unwed fathers, were adversely affected by the rule. This factor coupled with the conclusion that the policy, by its nature, could only be applied against females, led the district court to hold alternatively that "assuming a rational relation does exist between the Drew policy and legitimate educational objectives, the rule creates an inherently suspect classification based on sex, i. e. single women, which cannot survive strict scrutiny mandated by the Fourteenth Amendment." 371 F.Supp. at 35. The district court's primary holding was that the rule "has no rational relation to the objectives ostensibly sought to be achieved by the school officials and is fraught with invidious discrimination; thus it is constitutionally defective under the traditional, and most lenient, standard of equal protection and violative of due process as well." Ibid. at 31. Thus this appeal concerns a policy or rule that has not only been held to violate equal protection for alternative reasons, but has also been held to violate due process. On the basis relied upon by the district court of traditional notions of equal protection, because the policy created an irrational classification, we affirm.[5]

"Traditional" equal protection analysis requires that legislative classifications must be sustained as long as the classification itself is rationally related to a legitimate governmental interest. United States Department of Agriculture v. Moreno, 1973, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d

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"This applicant would have been hired in January 1973 if I had not received information from Mrs. Clara Robinson and others at James Elementary that she had a child. The applicant stated on her application that she was single and had no children. When she called by phone in January I informed her of the school policy and have had no contact with this applicant since then."

[5]Because we affirm upon traditional equal protection grounds, we do not consider the district court's alternative finding of a sex based classification or its legal conclusion that such classifications are inherently suspect.

782; Jefferson v. Hackney, 1972, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285; Weber v. Aetna Casualty & Surety Co., 1972, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768. To find the governmental objective ostensibly served by the rule, we turn to the testimony of Superintendent Pettey, the rule's originator and explicator. Pettey's avowed objective was to create a scholastic environment which was conducive to the moral development as well as the intellectual development of the students. Certainly this objective is not without legitimacy. See Shelton v. Tucker, 1960, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231; Adler v. Board of Education, 1952, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517. Schools have the right, if not the duty, to create a properly moral scholastic environment. See Beilan v. Board of Education, 1958, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414. But the issue is not simply whether the objective itself is legitimate, but rather whether the Pettey rule "advances that objective in a manner consistent with the Equal Protection Clause," Reed v. Reed, 1971, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225. We hold that it does not.

The District Court offers three possible rationales through which it asserts that its rule under attack furthers the creation of a properly moral scholastic environment: (1) unwed parenthood is prima facie proof of immorality; (2) unwed parents are improper communal role models, after whom students may pattern their lives; (3) employment of an unwed parent in a scholastic environment materially contributes to the problem of school-girl pregnancies.

[1-3] The first of these postulates violates not only the Equal Protection Clause, but the Due Process Clause as well. The law is clear that due process interdicts the adoption by a state of an irrebuttable presumption, as to which the presumed fact does not necessarily follow from the proven fact. See Cleveland Board of Education v. LaFleur,

1974, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52; Vlandis v. Kline, 1973, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63; Stanley v. Illinois, 1972, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551. Thus, unless the presumed fact here, present immorality,[6] necessarily follows from the proven fact, unwed parenthood, the conclusiveness inherent in the Pettey rule[7] must be held to violate due process. We agree with

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[6]If a state investigates the moral character of an individual upon whom it intends either to bestow a benefit or to impose a burden, due process requires that such inquiry look to *present* moral character. Thus, in Schware v. Board of Bar Examiners of New Mexico, 1957, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796, the Supreme Court held that the New Mexico Board of Bar Examiners violated an applicant's due process rights by refusing to consider his evidence of present good moral character in disallowing him membership to the bar. The Board relied instead on negative inferences drawn from Schware's past, in that approximately fifteen years prior to entering law school, he was a member of the Communist party, made use of aliases and had an arrest record. In reversing the Board's denial of admission, the Court noted that "if (Schware) otherwise qualifies for the practice of law and is admitted to the bar, the State has ample means to discipline him for any future misconduct." 353 U.S. at 247, n. 20, 77 S.Ct. at 760, n. 20.

[7]The conclusiveness of the Pettey rule was testified to by Superintendent Pettey himself:

Q. So I take it, Mr. Pettey, that a person who supposedly has a, quote, illegitimate child, as you put it, that fact, no matter when it took place or no matter under what circumstances it took place, is prima facie evidence of a lack of morality:

A. It would be to me, yes.

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THE COURT: Mr. Pettey, you do not think the facts or circumstances under which an illegitimate birth occurred is at all relevant to the issue of good character or bad character?

A. No sir. That would be hard to get at. I think the fact that the birth occurred without the benefit of matrimony is, to me, proof enough of the . . .

THE COURT: Is conclusive?

A. Yes sir.

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THE COURT: . . . Suppose a woman had an illegitimate child and then later married either the father of the child or another man.

the district court that the one does not necessarily follow the other:

> By the rule, a parent, whether male or female, who has had such a child, would be forever precluded from employment. Thus no consideration would be given to the subsequent marriage of the parent or to the length of time elapsed since the illegitimate birth, or to a person's reputation for good character in the community. A person could live an impeccable life, yet be barred as unfit for employment for an event, whether the result of indiscretion or not, occurring at any time in the past. But human experience refutes the dogmatic attitude inherent in such a policy against unwed parents. Can it be said that an engaged woman, who has premarital sex, becomes pregnant, and whose fiance dies or is killed prior to their marriage, is morally depraved for bearing the posthumous child? The rule allows no compassion for the person who has been unwittingly subjected to sexual relations through force, deceptive design or while under the influence of drugs or alcohol, yet chooses to have the child rather than to abort it. The rule makes no distinction between the sexual neophyte and the libertine. In short, the rule leaves no consideration for the multitudinous circumstances under which illegitimate childbirth may occur and which may have little, if any, bearing on the parent's present moral worth. A past biological event like childbirth out of wedlock, even if relevant to the issue, may not be controlling: and that it may be considered more conventional or circumspect for the infant to be surrendered to others for upbringing rather than be reared by the natural parent is hardly determinative of the matter. Furthermore, the policy, if based on moral judgment, has inherent if unintended defects or shortcomings. While obviously aimed at discouraging prematerial (sic) sex relations, the policy's effect is

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When she presented herself to you she showed she was married and had a child, one child. Would you consider her for employment?

A. No, sir, I would not.

apt to encourage abortion, which is itself staunchly opposed by some on ethical or moral grounds. It totally ignores, as a disqualification, the occurrence of extra-marital sex activity, though thought of by many as a more serious basis for moral culpability. Indeed, the superintendent's fiat, altogether unsupported by sociological data, equates the single fact of illegitimate birth with irredeemable moral disease. Such a presumption is not only patently absurd, it is mischievous and prejudicial, requiring those who administer the policy to "investigate" the parental status of school employees and prospective applicants. Where no stigma may have existed before, such inquisitions by overzealous officialdom can rapidly create it. 371 F.Supp. at 33-34 (footnotes deleted).

[4, 5] We observe also that there are reasonable alternative means through which to remove or suspend teachers engaging in immoral conduct; means that guarantee the teacher a public hearing on the merits and right of appeal. 5 Miss.Code Sec. 6282-26 (1971 Supp.).[8] By denying a public hearing to which all other teachers charged with immoral conduct are entitled, the policy denies unwed parents equal protection of the laws. Insofar as the rule inextricably binds unwed parental status to irredeemable

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[8]Sec. 6282-26 reads, in pertinent part:

Suspension of superintendent, principal, or teacher—notice—appeal. —For incompetence, neglect of duty, immoral conduct, intemperance, brutal treatment of a pupil or other good cause the county superintendent of education or superintendent of the municipal separate school district, as the case may be, may remove or suspend any . . . teacher in any school district, but before being so removed or suspended the . . . teacher shall be notified of the charges against him and he shall be advised that he is entitled to a public hearing upon said charges at a date to be fixed in such notice. . . . From the decision made at said hearing the . . . teacher shall be allowed an appeal to the state board of education . . . . Any party aggrieved by the said ruling of the state board of education may effect an appeal therefrom to the chancery court . . . .

immorality, it violates both due process and equal protection.

[6] The school district urges a second rationale for its rule based upon the holding in McConnell v. Anderson, 8 Cir. 1971, 451 F.2d 193:

> "What the school board looks at is whether, moral considerations aside, proper educational growth can be furthered and respect for marriage ingrained by employing unwed parents. The question then becomes whether the open and notorious existence of the status as an unwed parent would injure the affected students." Reply Brief of Defendants/Appellants, p. 5.

McConnell, a male homosexual, had been offered a position at the University of Minnesota pending approval of the Board of Regents. While Board action was pending, McConnell and a male friend attempted to obtain a marriage license, an event which generated at least four local newspaper articles as well as local radio and television news coverage. Following this action the Board disapproved McConnell's appointment with the statement that his "personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."[9] 451 F.2d at 194. In upholding the Board of Regents' decision, the Eighth Circuit specified that McConnell was not denied employment because of his homosexual tendencies or his desire to continue homosexual conduct clandestinely, but rather because of his "activist role in implementing his unconventional ideas concerning the societal status to be accorded homosexuals," which would

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[9]We think it significant also that upon request, McConnell was given an opportunity to appear before the Board of Regents with counsel to present information claimed to support his application. It was only after this hearing that the Regents adopted the resolution to disapprove the appointment.

have had the effect of forcing "tacit approval of this socially repugnant concept" upon the University. 451 F.2d at 196.

We do not consider *McConnell* supportive of the District's position. The record before us contains no evidence of proselytizing of pupils by the plaintiffs and reveals instead that each plaintiff, along with her illegitimate offspring, is living under the same roof as her parents, brothers and sisters. It would be a wise child indeed who could infer knowledge of either plaintiff's unwed parent status based on the manner of plaintiffs' existence. As the district court observed:

> "In the absence of overt, positive stimuli to which children can relate, we are convinced that the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative. We are not at all persuaded by defendants' suggestions, quite implausible in our view, that students are apt to seek out knowledge of the personal and private family life-styles of teachers or other adults within a school system (i. e. whether they are divorced, separated, happily married or single, etc.), and, when known, will approve of and seek to emulate them." 371 F.Supp. at 35.

In our view then, the school district's second offered justification for the unwed parent policy also falls short of equal protection requirements.

The third rationale proffered by the school district in hopes of salvaging the Pettey rule, that the presence of unwed parents in a scholastic environment materially contributes to school-girl pregnancies is without support, other than speculation and assertions of opinion, in the record before us.

Because we hold that the Board rule under attack violated traditional concepts of equal protection, we find it unnecessary to discuss numerous other issues urged on ap-

peal by appellees or in their behalf by *amici curiae*; for example, whether the rule creates a suspect classification based upon race or sex, or whether it infringes upon some constitutionally protected interest such as the right to privacy or the right to procreation.[10]

[7] Finally we find insufficient justification to reverse on cross-appeal the district court's denial of attorney fees.[11]

Affirmed.

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[10]Both the Equal Employment Opportunity Commission and the Center for Constitutional Rights filed *Amicus Curiae* briefs before this court urging that the basis for our decision be broadened to include some or all of these issues. Both Amici sought and were denied leave to participate in oral argument.

[11]Despite his alternative ground of decision, discrimination as to sex in violation of the Fourteenth Amendment, the district judge denied the award of attorneys' fees in a separate order entered after his injunctive and declaratory decree. No reasons were assigned. Because of the strong congressional policy against unlawful discrimination in employment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; Weeks v. Southern Bell Tel. & Tel. Co., 5 Cir. 1969, 408 F.2d 228, we would seriously consider reversal for failure to award attorneys' fees, if we could base our affirmance on that congressional policy's proper vindication. See Clark et al. v. American Marine Corporation, 5 Cir. 1971, 437 F.2d 959, affirming per curiam, Clark et al. v. American Marine Corporation, E.D.La. 1970, 320 F.Supp. 709; cf. Newman v. Piggie Park Enterprises, 1968, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263. But review of the finding of discrimination as to sex, especially since no Title VII violation was asserted by the pleadings or dealt with by the trial court, (Note 1, supra) presents a thicket we deem it unwise to enter. In the procedural posture which has evolved, we perceive no error in the refusal to award attorneys' fees.

429 U.S. 274, 50 L.Ed.2d 471

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION, Petitioner,

v.

Fred DOYLE.

No. 75-1278.

Argued Nov. 3, 1976.
Decided Jan. 11, 1977.

Mr. Justice REHNQUIST delivered the opinion of the Court.

Respondent Doyle sued petitioner Mt. Healthy Board of Education in the United States District Court for the Southern District of Ohio. Doyle claimed that the Board's refusal to renew his contract in 1971 violated his rights under the First and Fourteenth Amendments to the United States Constitution. After a bench trial the District Court held that Doyle was entitled to reinstatement with backpay. The Court of Appeals for the Sixth Circuit affirmed the judgment, 529 F.2d 524, and we granted the Board's petition for certiorari, 425 U.S. 933, 96 S.Ct. 1662, 48 L.Ed.2d 174, to consider an admixture of jurisdictional and constitutional claims.

I

[1] Although the respondent's complaint asserted jurisdiction under both 28 U.S.C. § 1343 and 28 U.S.C. § 1331, the District Court rested its jurisdiction only on § 1331. Petitioner's first jurisdictional contention, which we have little difficulty disposing of, asserts that the $10,000 amount in controversy required by that section is not satisfied in this case.

The leading case on this point is *St. Paul Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938), which stated this test:

> "[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction." *Id.*, at 288-289, 58 S.Ct., at 590. (Footnotes omitted.)

We have cited this rule with approval as recently as *Weinberger v. Wiesenfeld*, 420 U.S. 636, 642 n. 10, 95 S.Ct. 1225, 1230, 43 L.Ed.2d 514 (1975), and think it requires disposition of the jurisdictional question tendered by the petition in favor of the respondent. At the time Doyle brought this action for reinstatement and $50,000 damages, he had already accepted a job in a different school system paying approximately $2,000 per year less than he would have earned with the Mt. Healthy Board had he been rehired. The District Court in fact awarded Doyle compensatory damages in the amount of $5,158 by reason of income already lost at the time it ordered his reinstatement. Even if the District Court had chosen to award only compensatory damages and not reinstatement, it was far from a "legal certainty" at the time of suit that Doyle would not have been entitled to more than $10,000.

II

The Board has filed a document entitled "Supplemental Authorities" in which it raises quite a different "jurisdictional" issue from that presented in its petition for certiorari and disposed of in the preceding section of this opinion. Relying on the District Court opinion in *Weath-*

ers v. West Yuma County School Dist., 387 F.Supp. 552, 556 (Colo.1974), the Board contends that even though Doyle may have met the jurisdictional amount requirement of § 1331 it may not be subjected to liability in this case because Doyle's only substantive constitutional claim arises under 42 U.S.C. § 1983. Because it is not a "person" for purposes of § 1983, the Board reasons, liability may no more be imposed on it where federal jurisdiction is grounded on 28 U.S.C. § 1331 than where such jurisdiction is grounded on 28 U.S.C. § 1343.

The District Court avoided this issue by reciting that it had not "stated any conclusion on the possible Monroe-Kenosha problem in this case since it seems that the case is properly here as a § 1331 case, as well as a § 1983 one." Pet. for Cert. 14a-15a. This reference to our decisions in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), and *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), where it was held that a municipal corporation is not a suable "person" under § 1983, raises the question whether petitioner Board in this case is sufficiently like the municipal corporations in those cases so that it, too, is excluded from § 1983 liability.

The quoted statement of the District Court makes clear its view that if the jurisdictional basis for the action is § 1331, the limitations contained in 42 U.S.C. § 1983 do not apply. The Board argues, on the contrary, that since Congress in § 1983 has expressly created a remedy relating to violations of constitutional rights under color of state law, one who seeks to recover for such violations is bound by the limitations contained in § 1983 whatever jurisdictional section he invokes.

The question of whether the Board's arguments should prevail, or whether as respondent urged in oral argument, we should, by analogy to our decision in *Bivens v. Six Un-*

known Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983, is one which has never been decided by this Court. Counsel for respondent at oral argument suggested that it is an extremely important question and one which should not be decided on this record. We agree with respondent.

[2] The Board has raised this question for the first time in a document filed after its reply brief in this Court. Were it in truth a contention that the District Court lacked jurisdiction, we would be obliged to consider it, even as we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction. *Liberty Mutual Ins. Co. v. Wetzel,* 424 U.S. 737, 740, 96 S.Ct. 1202, 1204, 47 L.Ed.2d 435 (1976); *Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908). And if this were a § 1983 action, brought under the special jurisdictional provision of 28 U.S.C. § 1343 which requires no amount in controversy, it would be appropriate for this Court to inquire, for jurisdictional purposes whether a statutory action had in fact been alleged. *City of Kenosha v. Bruno, supra.* However, where an action is brought under § 1331, the catchall federal-question provision requiring in excess of $10,000 in controversy, jurisdiction is sufficiently established by allegation of a claim under the Constitution or federal statutes, unless it "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction . . ." *Bell v. Hood,* 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946); *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.,* 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912 (1951).

[3] Here respondent alleged that the Board had violated his rights under the First and Fourteenth Amendments and

claimed the jurisdictionally necessary amount of damages. The claim that the Board is a "person" under § 1983, even assuming the correctness of the Board's argument that the § 1331 action is limited by the restrictions of § 1983, is not so patently without merit as to fail the test of *Bell v. Hood, supra.* Therefore, the question as to whether the respondent stated a claim for relief under § 1331 is not of the jurisdictional sort which the Court raises on its own motion. The related question of whether a school district is a person for purposes of § 1983 is likewise not before us. We leave those questions for another day, and assume, without deciding, that the respondent could sue under § 1331 without regard to the limitations imposed by 42 U.S.C. § 1983.

III

The District Court found it unnecessary to decide whether the Board was entitled to immunity from suit in the federal courts under the Eleventh Amendment, because it decided that any such immunity had been waived by Ohio statute and decisional law. In view of the treatment of waiver by a State of its Eleventh Amendment immunity from suit in *Ford Motor Co. v. Dept. of Treasury,* 323 U.S. 459, 464-466, 65 S.Ct. 347, 350-351, 89 L.Ed. 389 (1945), we are less sure than was the District Court that Ohio had consented to suit against entities such as the Board in the federal courts. We prefer to address instead the question of whether such an entity had any Eleventh Amendment immunity in the first place, since if we conclude that it had none it will be unnecessary to reach the question of waiver.

[4, 5] The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Ford Motor Co. v.*

Dept. of Treasury, supra, but does not extend to counties and similar municipal corporations. See *Lincoln County v. Luning,* 133 U.S. 529, 530, 10 S.Ct. 363, 33 L.Ed. 766 (1890); *Moor v. County of Alameda,* 411 U.S. 693, 717-721, 93 S.Ct. 1785, 1799-1801, 36 L.Ed.2d 596 (1973). The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends, at least in part, upon the nature of the entity created by state law. Under Ohio law the "State" does not include "political subdivisions," and "political subdivisions" do include local school districts. Ohio Rev.Code Ann. § 2743.01 (Page Supp.1975). Petitioner is but one of many local school boards within the State of Ohio. It is subject to some guidance from the State Board of Education, Ohio Rev.Code Ann. § 3301.07 (Page 1972 and Supp.1975), and receives a significant amount of money from the State. Ohio Rev.Code Ann. § 3317 (Page 1972 and Supp.1975). But local school boards have extensive powers to issue bonds, Ohio Rev.Code Ann. § 133.27 (Page 1969), and to levy taxes within certain restrictions of state law. Ohio Rev.Code Ann. §§ 5705.02, 5705.03, 5705.192, 5705.194 (Page 1973 and Supp.1975). On balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.

IV

Having concluded that respondent's complaint sufficiently pleaded jurisdiction under 28 U.S.C. § 1331, that

the Board has failed to preserve the issue whether that complaint stated a claim upon which relief could be granted against the Board, and that the Board is not immune from suit under the Eleventh Amendment, we now proceed to consider the merits of respondent's claim under the First and Fourteenth Amendments.

Doyle was first employed by the Board in 1966. He worked under one-year contracts for the first three years, and under a two-year contract from 1969 to 1971. In 1969 he was elected president of the Teachers' Association, in which position he worked to expand the subjects of direct negotiation between the Association and the Board of Education. During Doyle's one-year term as president of the Association, and during the succeeding year when he served on its executive committee, there was apparently some tension in relations between the Board and the Association.

Beginning early in 1970, Doyle was involved in several incidents not directly connected with his role in the Teachers' Association. In one instance, he engaged in an argument with another teacher which culminated in the other teacher's slapping him. Doyle subsequently refused to accept an apology and insisted upon some punishment for the other teacher. His persistence in the matter resulted in the suspension of both teachers for one day, which was followed by a walkout by a number of other teachers, which in turn resulted in the lifting of the suspensions.

On other occasions, Doyle got into an argument with employees of the school cafeteria over the amount of spaghetti which had been served him; referred to students, in connection with a disciplinary complaint, as "sons of bitches"; and made an obscene gesture to two girls in connection with their failure to obey commands made in his capacity as cafeteria supervisor. Chronologically the last in the series of incidents which respondent was involved in

during his employment by the Board was a telephone call by him to a local radio station. It was the Board's consideration of this incident which the court below found to be a violation of the First and Fourteenth Amendments.

In February 1971, the principal circulated to various teachers a memorandum relating to teacher dress and appearance, which was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues. Doyle's response to the receipt of the memorandum —on a subject which he apparently understood was to be settled by joint teacher-administration action—was to convey the substance of the memorandum to a disc jockey at WSAI, a Cincinnati radio station, who promptly announced the adoption of the dress code as a news item. Doyle subsequently apologized to the principal, conceding that he should have made some prior communication of his criticism to the school administration.

Approximately one month later the superintendent made his customary annual recommendations to the Board as to the rehiring of nontenured teachers. He recommended that Doyle not be rehired. The same recommendation was made with respect to nine other teachers in the district, and in all instances, including Doyle's, the recommendation was adopted by the Board. Shortly after being notified of this decision, respondent requested a statement of reasons for the Board's actions. He received a statement citing "a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships." That general statement was followed by references to the radio station incident and to the obscene-gesture incident.[1]

[1] "I. You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships.

The District Court found that all of these incidents had in fact occurred. It concluded that respondent Doyle's telephone call to the radio station was "clearly protected by the First Amendment," and that because it had played a "substantial part" in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with backpay. App. to Pet. for Cert. 12a-13a. The District Court did not expressly state what test it was applying in determining that the incident in question involved conduct protected by the First Amendment, but simply held that the communication to the radio station was such conduct. The Court of Appeals affirmed in a brief *per curiam* opinion. 529 F. 2d 524.

[6] Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

That question of whether speech of a government employee is constitutionally protected expression necessarily entails striking "a balance between the interests of the

"A. You assumed the responsibility to notify W.S.A.I. Radio Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people. This raised much concern not only within this community, but also in neighboring communities.

"B. You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present.

"Sincerely yours,
"Rex Ralph
"Superintendent"

teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734, 20 L. Ed. 2d 811 (1968). There is no suggestions by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum public. We therefore accept the District Court's finding that the communication was protected by the First and Fourteenth Amendments. We are not, however, entirely in agreement with that court's manner of reasoning from this finding to the conclusion that Doyle is entitled to reinstatement with backpay.

The District Court made the following "conclusions" on this aspect of the case:

> "1) If a non-permissible reason, *e. g.*, exercise of First Amendment rights, played a substantial part in the decision not to renew—even in the face of other permissible grounds—the decision may not stand (citations omitted).
>
> "2) A non-permissible reason did play a substantial part. That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons—the one, the conversation with the radio station clearly protected by the First Amendment. A court may not engage in any limitation of First Amendment rights based on 'tact'—that is not to say that the 'tactfulness' is irrelevant to other issues in this case." App. to Pet. for Cert. 12a-13a.

At the same time, though, it stated that

> "[i]n fact, as this Court sees it and finds, both the Board and the Superintendent were faced with a situation in which there did exist in fact reason . . . in-

dependent of any First Amendment rights or exercise thereof, to not extend tenure." *Id.*, at 12a.

[7] Since respondent Doyle had no tenure, and there was therefore not even a state-law requirement of "cause" or "reason" before a decision could be made not to renew his employment, it is not clear what the District Court meant by this latter statement. Clearly the Board legally *could* have dismissed respondent had the radio station incident never come to its attention. One plausible meaning of the court's statement is that the Board and the Superintendent not only could, but in fact *would* have reached that decision had not the constitutionally protected incident of the telephone call to the radio station occurred. We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think it would not.

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of

constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord "tenure." The long-term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event.

In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused. We think those are instructive in formulating the test to be applied here.

In *Lyons v. Oklahoma,* 322 U.S. 596, 64 S. Ct. 1208, 88 L. Ed. 1481 (1944), the Court held even though the first confession given by a defendant had been involuntary, the Fourteenth Amendment did not prevent the State from using a second confession obtained 12 hours later if the coercion surrounding the first confession had been sufficiently dissipated as to make the second confession voluntary. In *Wong Sun v. United States,* 371 U.S. 471, 491, 83 S. Ct. 407, 419, 9 L. Ed. 2d 441 (1963), the Court was willing to assume that a defendant's arrest had been unlawful but held that "the connection between the arrest and the statement [given several days later] had 'become so attenuated as to dissipate the taint.' *Nardone v. United*

States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307." *Parker v. North Carolina*, 397 U.S. 790, 796, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970), held that even though a confession be assumed to have been involuntary in the constitutional sense of the word, a guilty plea entered over a month later met the test for the voluntariness of such a plea. The Court in *Parker* relied on the same quoted language from *Nardone, supra*, as did the Court in *Wong Sun, supra*. While the type of causation on which the taint cases turn may differ somewhat from that which we apply here, those cases do suggest that the proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.

Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or to put it in other words, that it was a "motivating factor"[2] in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

We cannot tell from the District Court opinion and conclusions, nor from the opinion of the Court of Appeals affirming the judgment of the District Court, what conclusion those courts would have reached had they applied this test. The judgment of the Court of Appeals is therefore vacated, and the case remanded for further proceedings consistent with this opinion.

So ordered.

[2]*See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S., at 270-271, n. 21, 97 S.Ct., at 566.